Supreme Court, U. S.
FILED
AUG 25 1975
MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

ROBERT E. GOODFRIEND
EDWARD A. COPLEY
2800 Republic Nat'l Bank Bldg.
Dallas, Texas 75201

CYRIL D. KASMIR
2300 Main Tower
Dallas, Texas 75202
Attorneys for Respondents

Of Counsel:
AKIN, GUMP, STRAUSS, HAUER & FELD
2800 Republic National Bank Bldg.
Dallas, Texas 75201

Of Counsel:
ROSENBERG, KASMIR & WILLINGHAM
2300 Main Tower
Dallas, Texas 75202

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-4257

INDEX

Page

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Questions Presented 2

Statement of the Case 2

Summary of Argument 8

Argument 22

I. Several Of The Issues Raised By The Government In Its Brief Are Not Properly Before This Court For Review Because They Were Not Presented To Or Decided By The Courts Below, Were Not Set Forth Or Fairly Comprised Within The Questions Presented In The Petition For Writ Of Certiorari, And Were Not Presented In A Brief That Was Timely Filed Under This Court's Own Rules 22

II. The Papers Involved In This Case Are Neither The Papers Of A Collective Entity Nor Are They Held By The Taxpayers In A Representative Capacity 29

A. The Essential Character Of Papers As Organizational Papers Is Not Determined By Their Ownership, Authorship Or Prior Custodial History 31

B. The Accountant's Workpapers Are Held By The Taxpayers In This Case In A Purely Personal Capacity, Not In A Representative Capacity, And The Collective Entity Cases Are Therefore Inapplicable 42

Page

C. Where The Accused Has A Significant Personal Interest In The Records In Question, That Interest May Not Be Subordinated To Or Disregarded In Favor Of The Governmental Interest In Regulating Collective Entities Without Seriously Impairing The Fundamental Values Protected By The Fifth Amendment 46

III. Accountant's Workpapers Do Not Become Public Or Quasi-Public In Nature Simply Because Portions Of Their Contents May Have Previously Been Disclosed In The Taxpayers' Income Tax Returns 49

IV. The Taxpayers' Fifth Amendment Privilege In The Accountant's Workpapers Was Not Lost By Transferring The Workpapers To Taxpayers' Attorney 62

V. The Accountant's Workpapers Are Testimonial In Nature And Their Compelled Production Would Incriminate The Taxpayers 69

VI. Taxpayers' Attorney Has Standing To Raise Taxpayers' Constitutional Rights 80

Conclusion 91

Appendix A-1

Cases Page

Alma-Schuhfabrik AG v. Rosenthal, 25 F.R.D. 100 (E.D. N.Y. 1960) 88

Application of House, 144 F.Supp. 95 (N.D.Cal. 1956) .. 69, 80

Backer v. C.I.R., 275 F.2d 141 (5th Cir. 1960) 16, 66

Balistrieri v. United States, 394 U.S. 985 (1969) 86

Ballman v. Fagin, 200 U.S. 186 (1906) 57

Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission, 221 U.S. 612 (1911) 29, 33

Bellis v. United States, 417 U.S. 85 (1974) ..... *passim*

Bertrand v. Mutual Motor Co., 38 S.W.2d 417 (Tex. Civ. App.—Eastland, 1931) 46

Bifferato v. States Marine Corp. of Delaware, 11 F.R.D. 44 (S.D. N.Y. 1951) 20, 88

Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) 18, 81, 82, 84

Boyd v. United States, 116 U.S. 616 (1886) 47, 48, 49, 50, 51, 72

Brody v. United States, 243 F.2d 378, 387, n. 5 (1st Cir. 1957), cert. den., 354 U.S. 923 (1957) 80

Chambliss v. State, 231 P.2d 711, 713 (Okla. 1951) 48

Clifton v. Granger, 53 N.W. 316 (Iowa 1892) 80

Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. den., 371 U.S. 951 (1963) 69, 80

Couch v. United States, 409 U.S. 322 (1973) ..... *passim*

Counselman v. Hitchcock, 142 U.S. 547 (1892) 77

Curcio v. Uinted States, 354 U.S. 118, 121 (1957) 17, 29, 63, 71

Davis v. United States, 328 U.S. 582 (1946) 13, 52

Donaldson v. United States, 400 U.S. 517 (1971) 20, 85

Cases	Page
Drehle v. Fleming, 274 N.E.2d 53 (Ill. Sp. Ct. 1971)	88
Dunigan v. United States, 274 U.S. 195 (1927)	8, 24
English v. Dhane, 294 S.W.2d 709 (Tex. 1956)	11, 45
Essgee v. United States, 262 U.S. 151 (1923)	29
Ex Parte Lipscomb, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922)	19, 82
Ex Parte Wilson, 47 S.W. 996 (Tex. 1898)	48
Frost Trucking Co. v. Railroad Comm'n. of State of California, 271 U.S. 583 (1926)	67
Gardner v. Broderick, 392 U.S. 273 (1968)	16, 60, 67
Gathright v. Carl Markley Motor Co., 146 S.W.2d 307, 311 (Tex. Civ. App.—Beaumont, 1940, no writ)	11, 46
Gouled v. United States, 255 U.S. 298 (1921)	17, 72
Grant v. United States, 227 U.S. 74, 80 (1913)	34
Hale v. Henkel, 201 U.S. 43 (1906)	18
Harris, Matter of, 221 U.S. 274, 279-280 (1911)	60, 61
Hill v. Campbell and Wife, Law Rep. 10 C.P. 222 (1875)	56
Hill v. Philpott, 445 F.2d 144 (7th Cir. 1971), cert. den., 404 U.S. 991 (1971)	56, 72
Hoffman v. United States, 341 U.S. 479 (1951)	21, 89
Hughes v. Foster, Lewis, Langley & Onion, 65-1 U.S.T.C. ¶9418 (W.D. Tex. 1964), govt's appeal dismissed, December 16, 1965.	69, 80
In re Fahey, 300 F.2d 383 (6th Cir. 1961)	81, 82, 84
In re National Public Utility Investing Corporation, 79 F.2d 302 (2d Cir. 1935)	88
In re Rivera, 79 F.Supp. 510 (S.D. N.Y. 1948)	88

Cases	Page
In re Roney, 139 F.2d 175 (7th Cir. 1944), cert. den., 322 U.S. 753 (1944)	91
In re Ruppert, 309 F.2d 97, 98 (6th Cir. 1962)	20, 88
Irvine v. California, 347 U.S. 128, 129 (1954)	8, 28
Johnson v. Zerbst, 304 U.S. 458 (1938)	60
Laird v. Air Carrier Engine Service, 263 F.2d 948 (5th Cir. 1959)	19, 86, 87
Lawn v. United States, 355 U.S. 339, 362, n. 16 (1958)	8, 24, 25, 28
McCarthy v. Arndstein, 266 U.S. 34, 41 (1924)	60, 61
Maness v. Meyers, 43 U.S.L.W. 4143 (Jan. 15, 1975)	15, 16, 17, 20, 66, 79, 85
Mazer v. Stein, 347 U.S. 201, 208 (1954)	27
Miranda v. Arizona, 384 U.S. 436 (1966)	60, 66
Murphy v. Waterfront Commission of New York Harbor, 378 U.S. 52 (1964)	58, 85
People v. Minkowitz, 220 N.Y. 399, 115 N.E. 987 (1917)	65, 69
People v. Myers, 35 Ill.2d 311, 220 N.E.2d 297, 310 (1966)	33, 80
Reisman v. Caplin, 375 U.S. 440, 449 (1964)	21, 90
Remmer v. United States, 205 F.2d 277, 285 (9th Cir. 1953), reversed on other grounds, 347 U.S. 827 (1954)	65
Rogers v. United States, 340 U.S. 367 (1951)	29
Russell v. United States, 369 U.S. 749, 754, n. 7 (1962)	24
Schmerber v. California, 384 U.S. 757 (1966)	16, 17, 23, 69, 70, 74, 75, 77
Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir. 1956), cert. den., 352 U.S. 833 (1956)	19, 73, 82, 88

Cases — Page

Simmons v. United States, 390 U.S. 377 (1968) 84

Spevak v. Klein, 385 U.S. 511 (1967) 16, 66, 67

State v. Kirchess, 269 So.2d 16 (Fla.Ct.App.) 78

Stevens v. Marks, 383 U.S. 234, 243-244 (1966) 60, 67

Stuart v. United States, 416 F.2d 459, 463 (5th Cir. 1969) 85

Travelers Health Assn. v. Virginia, 339 U.S. 643, 651, n. 4 (1950) 24

Tyrrell v. District of Columbia, 243 U.S. 1 (1916) 24

Unger v. Los Angeles Transit Lines, 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960) 88

Uniform Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968) 67

United Brotherhood, C & J v. United States, 330 U.S. 395, 412 (1947) 25

United States v. Blank, 459 F.2d 383 (6th Cir. 1972) 72

United States v. Boccuto, 175 F.Supp. 886 (D.N.Y. 1959), appeal dismissed, 274 F.2d 860 80

United States v. James L. Cobb, Jr., 75-2 CCH Tax Rptr. §9534 (6th Cir. 1975) 38

United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) 13, 43, 52, 53, 54, 55, 62

United States v. DeCastro, West & Chodorow, Inc., 75-2 CCH Fed. Tax Rptr §9535 (6th Cir. 1975) 60

United States v. Dionisio, 410 U.S. 1 (1973) 16, 17, 23, 70, 72

United States v. Estate of Donnelly, 397 U.S. 286, n. 5 (1970) 8, 24

United States v. Fisher, 500 F.2d 683 (3rd Cir. 1974), cert. granted, 43 U.S.L.W. 3412 (Jan. 27, 1975) (No. 74-18) 7, 45, 51

Cases — Page

United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964), cert. den., 377 U.S. 976 (1964) 81

United States v. Grunewald, 233 F.2d 556, 581 (2d Cir. 1956), reversed, 353 U.S. 391 (1957) 58

United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) .. 16, 66

United States v. Hoth, 207 F.2d 386, 389 (9th Cir. 1953) .. 24

United States v. Judson, 322 F.2d 460 (9th Cir. 1963) 15, 16, 18, 64, 65, 67, 68, 69, 80, 81, 83, 84

United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), cert. granted, 43 U.S.L.W. 3412 (Jan. 27, 1975) (No. 74-611) 18, 21, 65, 80, 89, 90

United States v. Kovel, 296 F.2d 918 (2d Cir. 1961) 64

United States v. Mara, 410 U.S. 19 (1973) 16, 23, 70

United States v. Newman, 441 F.2d 165, 174 (5th Cir. 1971) 85

United States v. Nobles, 43 U.S.L.W. 4815, 4817, n. 4, 4818 (June 23, 1975) 17, 24, 41, 75, 76

United States v. Riland, 364 F.Supp. 120, 121-122 (S.D. N.Y. 1973) 69

United States v. White, 322 U.S. 694 (1944) 10, 29, 35, 36, 37, 39, 42, 70, 71, 89

United States v. White, 477 F.2d 757 (5th Cir. 1973), aff'd. per curiam en banc, 487 F.2d 1335, cert. den., 419 U.S. 872 (1974) 18, 81

United States Corp. v. Guillory, 206 F.2d 49 (5th Cir. 1953) 91

Van Brunt & Davis Co. v. Harrigan, 8 S.D. 96, 98, 65 N.W. 421, 422 (1895) 46

Warden v. Hayden, 387 U.S. 297 (1967) 70

Wheeler v. United States, 226 U.S. 478(1913) 29, 33

Cases Page

Williams v. Consolidated Investors, Inc., 472 P.2d 248 (Kan. Sp. Ct. 1970) 88

Wilson v. United States, 221 U.S. 361 (1911) 9, 13, 23, 29, 31, 32, 33, 34, 50, 78

Wong Sun v. United States, 371 U.S. 471 (1963) 85

Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949), cert. den., 338 U.S. 822 (1949) 81

Constitution and Statutes

United States Constitution:
Fifth Amendment ..... *passim*

Miscellaneous

Internal Revenue Code of 1954 (26 U.S.C.):
Sec. 7402(b) 2, 5
Sec. 7602 2
Sec. 7604(a) 2, 5

ABA Code of Professional Responsibility, Ethical Consideration 4-4 64

2A C.J.S., Agency, §8, pp. 563-564 45

8 C.J.S., Bailments, §520, p. 368 44

Federal Rules of Civil Procedure, Rule 1 91

IRS News Release IR-949 (1969), CCH Fed Tax Rptr. §6946 ..... 16, 66

Supreme Court Rules:
Rule 23(1)(c) 7, 25
Rule 40(d)(2) 8, 27

Texas Code of Criminal Procedure, §38.10 64

8 Wigmore, Evidence (McNaughton Rev. 1961)
Sec. 2259b 32
Sec. 2270 80
Sec. 2291 83
Sec. 2307 69
Sec. 2321 ..... 19, 82

In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-611

UNITED STATES OF AMERICA, et al.,
Petitioners,

v.

C. D. KASMIR and JERRY A. CANDY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The Order of the District Court (Pet. App. A 1A) is not reported. There is no written opinion of the District Court. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. B 2A-23A) is reported at 499 F.2d 444.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C 24A) was entered on August 21, 1974. The Petition for a Writ of

Certiorari was filed on November 18, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution. Sections 7402(b), 7602, and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

2. If the client's privilege against self-incrimination is available as a bar to production of his accountant's workpapers in these circumstances, whether the claimant's attorney can properly invoke his client's privilege.

STATEMENT OF THE CASE

On January 3, 1973, the Taxpayer, Dr. Edward J. Mason, was visited at his office in Dallas, Texas, by two Special Agents of the Internal Revenue Service who informed Dr. Mason that the tax returns for he and his wife, Rae Mason, for the years 1969, 1970, and 1971 were under investigation

(A. 38-39). The Special Agents advised Dr. Mason of his constitutional rights, including his right not to incriminate himself and his right to counsel (A. 39, 45). They informed Dr. Mason that one of the functions of a Special Agent was to investigate the possibility of criminal violations of the Internal Revenue laws and that anything Dr. Mason said or submitted to them might be used against him in a criminal proceeding (A. 45).

During the course of the ensuing conversation, Special Agent Mabrey asked to see Dr. Mason's personal books and records. Dr. Mason then placed certain records on his desk; records which are not involved in this case, which the Government admits are privileged and which the Government does not seek (A. 75-76). When the possibility was raised that some of the records for the years in question were missing, Dr. Mason placed a call to his accountant, Jerry Candy, one of the Respondents herein (A. 39, 52), in order to obtain tax records then in the possession of Tannebaum, Bindler & Lewis, the accounting firm where Mr. Candy was employed and which had handled the preparation of Dr. Mason's tax returns for the years in question (A. 50-51). When Mr. Candy learned that Dr. Mason was visiting with two Special Agents, he advised Dr. Mason not to show any of his records to the Special Agents (A. 39, 53), and Dr. Mason withdrew the records on his desk and concluded the interview (A. 40-41).

Following Dr. Mason's call to Mr. Candy, Mr. Candy called Cyril Kasmir, the other Respondent herein, a duly licensed attorney (A. 64), and informed him of the Special Agents' visit to Dr. Mason's office (A. 52, 60-61). At Mr. Candy's

request, Mr. Kasmir called Dr. Mason and was retained by the Taxpayers that same afternoon (A. 62).

Early the next morning, at the direction of his employer, Tannebaum, Bindler & Lewis, Mr. Candy delivered a quantity of files and records to Dr. Mason (A. 61). Dr. Mason received the files and records, gave Mr. Candy a receipt for them (A. 61 and Exhibit 6 at A. 89), and after about five to ten minutes of deliberations, Dr. Mason placed the records in the custody of his attorney, Mr. Kasmir (A. 55, 61).

On the following day, January 5, 1973, summonses were served on Mr. Candy and Mr. Kasmir ordering them to appear before Special Agent Mabrey on January 15, 1973, and then and there to give testimony and to produce for examination the following records of Tannebaum, Bindler & Lewis:

1. Accountant's work papers pertaining to Dr. E. J. Mason's books and records of 1969, 1970, and 1971.
2. Retained copies of Dr. E. J. Mason's income tax returns for 1969, 1970, and 1971.
3. Retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and Dr. E. J. Mason during 1969, 1970, and 1971 (A. 9-12).

Mr. Candy and Mr. Kasmir appeared on January 15, 1973, as directed, but refused to testify or to turn over any records to the Special Agents. Mr. Candy left a prepared statement with the Special Agents stating, in substance, that prior to the time he was served with the summons he had delivered the records described to Dr. Mason. He also refused to answer any questions on the grounds of the attorney-client privilege relating to any assistance he was providing Mr. Kasmir,

who had retained him to assist in analyzing the books and records of Dr. and Mrs. Mason regarding any potential tax liability for the years 1969, 1970, and 1971 (A. 22).

Mr. Kasmir also left a written statement with the Special Agents. He stated that he had been retained by Dr. and Mrs. Mason to represent them with respect to their income tax liability for the years 1969, 1970, and 1971, in connection with the audit of their income tax returns and the examination being conducted by the Internal Revenue Service. He declined to testify on the grounds of the attorney-client privilege and declined to produce the records on behalf of his clients based upon the Fourth Amendment protection against unreasonable search and seizure and the Fifth Amendment privilege against self-incrimination (A. 23).

On or about March 21, 1973, the United States Attorney filed a Petition to Enforce Internal Revenue Summons pursuant to Section 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §7402(b) and §7604(a), and an Order to Show Cause issued on March 21, 1973, setting a hearing on the Government's Petition for March 28, 1973 (A. 4, 13). Respondents herein filed a sworn Response to the Order to Show Cause and Motion to Quash Summons (A. 14) in which Mr. Candy stated, *inter alia*, that on January 4, 1973, prior to the receipt of the summons, he had delivered documents and files to Dr. Mason at the direction of his employer, Samuel H. Tannebaum, and relinquished to the Taxpayer, Dr. Mason, the rightful, indefinite and legitimate possession of such documents and files (A. 16, 17). Attorney

Kasmir stated in the Response, also under oath, that he had possession of certain documents and files delivered to him by Dr. Mason on January 4, 1973, and that his clients, Dr. and Mrs. Edward Mason, had specifically directed him to assert, on their behalf, their rights under the Fourth and Fifth Amendments (A. 18-19). He declined to produce the documents covered by the summons on the grounds that the Government's attempt to obtain production amounted to an unreasonable search and seizure and that the evidence contained in the documents would tend to incriminate the Taxpayers and might be used as evidence against them in criminal proceedings for violation of the Internal Revenue laws (A. 17-19).

A hearing on the Petition and Response was held on March 28, 1973, and the Court entered an Order finding that the records belonged to the accounting firm of Tannebaum, Bindler & Lewis; finding that they were in the possession of Mr. Kasmir; ordering Mr. Kasmir to appear before Special Agent Mabrey and there to produce for inspection all of the accountant's workpapers, reports, tax returns, and documents described in the summons; and further ordering Mr. Candy to appear before Special Agent Mabrey and to testify with respect to the accountant's records (A. 93). The Order was stayed pending appeal to the United States Court of Appeals for the Fifth Circuit (A. 94-95).

The Fifth Circuit reversed the Order of the District Court insofar as it had enforced the summons against Mr. Kasmir for production of the records and affirmed the District Court's Order with respect to Mr. Candy for his testimony concerning the sought-after documents. The Government did not seek a

stay of the decision of the Fifth Circuit and the mandate issued on October 7, 1974. The Government then filed its Petition for a Writ of Certiorari with this Court seeking review of the decision of the Fifth Circuit and this Court granted the Petition for a Writ of Certiorari on January 27, 1975. In its Order granting the Petition for a Writ of Certiorari, this Court ordered this case, No. 74-611, consolidated with *Fisher v. United States*, No. 74-18.

Taxpayers note an important limitation on the scope of review in this case. The summons served on Mr. Kasmir and Mr. Candy sought accountant's workpapers, retained copies of the Taxpayers' returns, retained copies of reports and other correspondence between Tannebaum, Bindler & Lewis and the Taxpayers (A. 81-84). However, the "Questions Presented" section of the Government's Petition for a Writ of Certiorari (Pet. for Writ at 2), and both the "Questions Presented" section and the text of the Government's Brief for the Petitioners (Pet. Brief at 2) indicate that the Government is seeking a review of the decision of the Fifth Circuit Court of Appeals only with respect to the accountant's workpapers. Since the other items sought by the summons were not included by the Government in the questions presented herein, or in its written argument, we assume that the decision of the Court of Appeals with respect to them will stand and will not be subject to review by this Court pursuant to Rule 23(1)(c) of the Supreme Court Rules. Therefore, following the Government's own Brief, we limit our discussion to the scope of the questions presented and we discuss only the application of the privilege to the accountant's workpapers.

SUMMARY OF ARGUMENT

1. In its Brief on the merits the Government contends that a taxpayer's Fifth Amendment privilege against self-incrimination does not extend to accountant's workpapers in the possession of the taxpayer's attorney because, *inter alia*, the workpapers are the records of a "collective entity," not the private papers of the accused; and because such records are not testimonial or communicative in nature. Taxpayers submit that these arguments are not properly before this Court for review since neither issue was raised or considered in the courts below. See *United States v. Estate of Donnelly*, 397 U.S. 286, n. 5 (1970); *Lawn v. United States*, 355 U.S. 339, 362, n. 16 (1958); *Dunigan v. United States*, 274 U.S. 195, 200 (1927). There are no exceptional circumstances in this case that would warrant a departure from this rule. *Lawn v. United States, supra.*

Further, neither issue was adequately set forth in the Government's Petition for Writ of Certiorari or fairly comprised within the questions presented in the Petition, as required by Supreme Court Rule 23(1)(c). The thrust of the questions presented went to the effect of the transfers of the workpapers from the accountant to the Taxpayers and from the Taxpayers to their attorney. Neither the questions presented in the Petition nor the accompanying legal argument adequately apprised the Court or Respondents of the Government's position in its Brief that the papers in this case belonged to a collective entity and that they were non-testimonial in nature. These issues were smuggled into the Government's Brief in violation of Rule 40(d)(2) after this Court granted certiorari. See also, *Irvine v. California*, 347 U.S. 128, 129 (1954).

Lastly, we subn it that the Court should not consider these issues because they were presented in a Brief filed *six weeks* beyond the deadline set by the third extension of time for filing, without even a motion for leave to file late.

Under these circumstances the "collective entity" and non-testimonial nature issues should not be considered on review. Alternatively, all costs of this appeal should be taxed against the Government, regardless of the outcome.

2. The Government contends that the accountant's workpapers in this case are not protected by the Taxpayers' privilege against self-incrimination because they are records of a collective entity. We agree that application of this exception to the availability of the privilege turns on an examination of the "essential character" of the papers and on whether they are possessed by the Taxpayers in a purely personal capacity. We disagree, however, with the Government's position that the "essential character" of the papers in question is determined by (1) whether the papers are owned by a collective entity, (2) whether they were created by a member of a collective entity, and (3) whether they were possessed by a collective entity at some time prior to the issuance of the summons.

Taxpayers submit that the cases concerned with the collective entity exception, from *Wilson v. United States*, 221 U.S. 361 (1911), to *Bellis v. United States*, 417 U.S. 85 (1974), establish that the organizational character of the documents in question was determined by the organizational character of the transactions to which such documents referred and by the fact that such documents were created on behalf of the collective entity

and in furtherance of its purposes. The cases do *not* demonstrate that ownership, authorship and prior possession are relevant to a determination of the "essential character" of the documents.

The workpapers in this case are not papers of a collective entity because they describe only the personal transactions of the Taxpayers, they were prepared on their behalf and in furtherance of their purposes, and they are based entirely on information which the Taxpayers provided to the accountant. Whatever nominal property interest the accountant had in the papers cannot overcome the Taxpayers' "significant personal interest" in them. The Government's attempt to make ownership of the papers determinative of the availability of the Fifth Amendment privilege must fail since it flies squarely in the face of this Court's contrary rule stated in *Couch v. United States*, 409 U.S. 322 (1973).

Further, the collective entity exception is simply inapplicable to the papers in this case because they are possessed by the Taxpayers in a purely personal capacity. This Court stated in *United States v. White*, 322 U.S. 694, 699 (1944), that ". . . the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*" (emphasis added).

The Government's interplay of semantics to describe the Taxpayers' possession as "custodial rather than personal" and as a "gratuitous bailment," Pet. Brief at 27, is of no relevance to a determination of the scope of the privilege. The question of a bailment has no impact upon the capacity in which a

non-owner possessor or bailee holds the property. The opinions of this Court offer no support for the proposition that possession of property in a purely personal capacity is inconsistent with possession by a non-owner or possession in a "custodial capacity." Furthermore, the use of the phrase "possession in a purely personal capacity" in *White* was meant to distinguish such possession from possession in a representative capacity and did not relate to any distinction between possession by an owner and by a non-owner bailee.

In this case, the papers were transferred to the Taxpayers by the accountant, who relinquished to the Taxpayers the "rightful, indefinite and legitimate possession" of them. (A. 17). Since the Taxpayers' possession of the papers was solely for their benefit and not for the benefit of their accountant, and since the accountant did not seek to limit or control the manner in which Taxpayers could make use of them, the Taxpayers held the papers in a purely personal capacity. *English v. Dhane*, 294 S.W. 2d 709 (Tex. 1956); *Gathright v. Carl Markley Motor Co.*, 146 S.W. 2d 307, 311 (Tex. Civ. App.-Beaumont, 1940, no writ). The Taxpayers were not officers, members or agents of the accounting firm; thus, their possession of the papers was not in a representative capacity.

The underlying basis for this Court's collective entity decisions is found not so much in the necessity for governmental regulation of collective entities, important as that may be, as in the need to prevent a purely private privilege from being extended to impersonal records in which the claimant has no significant personal interest. See *Bellis v. United States*, 417

U.S. 85, 93 (1974). But, where a significant personal interest in papers exists, as it clearly does in this case, that interest may not be disregarded in favor of the governmental interest in the regulation of collective entities without serious impairment to the fundamental values protected by the Fifth Amendment privilege.

The effect of extending the collective entity exception to client files will be to put a premium on the services of sole practitioners since "the privilege applies to the business records of . . . sole practitioners" *Bellis v. United States*, 417 U.S. 85, 87-88 (1974). But no valid constitutional principle is served by making the availability of the privilege turn on whether the accused consults an accountant who is a sole practitioner rather than a member of a professional corporation or partnership. A professional's membership in a professional corporation or partnership may be relevant in terms of the availability of the privilege to the professional, for he has chosen the manner in which he shall do business, but it should not control the constitutional rights of those he serves.

3. In close relation to its collective entity argument, the Government contends that the workpapers are not the "private papers" of the Taxpayers, and, therefore, are not subject to the privilege. The Government contends that because the papers were prepared by the accountant, albeit with information from the Taxpayers, and because some of that information was previously disclosed in the Taxpayers' income tax returns, the subsequent transfer of the workpapers to the Taxpayers does not reinvest them with constitutional protection.

Wilson v. United States, 221 U.S. 361, 378 (1911) disposes of the argument that papers are non-private if written by someone other than the accused. Moreover, Nothing in this Court's prior decisions on the availability of the privilege supports the Government's novel theory that prior disclosure of information in a document places that document forever beyond the reach of the privilege. Application of the privilege has never depended upon the degree of privacy with which the records were created or maintained. *United States v. Cohen*, 388 F.2d 464, 471 (9th Cir. 1967). Rather this Court's use of the term "private papers" has always indicated that such papers were simply papers that were not public or quasi-public in character. See, e.g., *Davis v. United States*, 328 U.S. 582, 588-589 (1946).

This Court's reference to an "expectation of privacy" in *Couch v. United States*, 409 U.S. at 335, does not dictate a different result. This Court's reference to an "expectation of privacy" was made in response to the argument that the accountant's possession of the papers should be deemed the equivalent of possession by the accused. In finding an insufficient expectation of privacy to establish the basis for "constructive possession," the Court did not address the situation where actual possession or control of the papers had been returned to the accused. *Couch* does not therefore establish "expectation of privacy" as an independent test that must be met even when the records have been returned to the Taxpayer or Taxpayers' attorney and when personal compulsion against the Taxpayers will necessarily result from enforcement of the summons.

The Government would have this Court replace the concept

of personal compulsion, central to the Fifth Amendment privilege, with a concept of "privacy." To do so not only contravenes the essence of the privilege, but invites endless inquiry into the prior custodial history of records in order to deny an otherwise valid claim of privilege on the grounds that the accused or his predecessor has not maintained the records with sufficient secrecy.

But even if it is necessary for the Taxpayers to show an "expectation of privacy" in the workpapers in order to claim their constitutional privilege, Taxpayers maintain that they had a "legitimate expectation of privacy" in the workpapers *at the time the summons was served* upon their attorney. Since this Court has held that the "rights and obligations of the parties became fixed when the summons was served," *Couch v. United States, supra,* 409 U.S. 329, n. 9, that was the time to examine the legitimacy of Taxpayers' expectation of privacy and not when the information in the papers was originally provided to the accountant. In *Couch,* the accused's expectation of privacy when the summons was served was no greater than when she delivered the papers to her accountant. In the instant case, on the other hand, the Taxpayers' expectation of privacy when they delivered the papers to their attorney cannot be questioned.

Since the accountant's workpapers were the "private papers" of the Taxpayers in every relevant respect except ownership, the forced production of them from the Taxpayers' attorney would compel self-incrimination, in violation of the Fifth Amendment.

4. The Government has conceded before this Court that

the transfer of the accountant's workpapers to the attorney should "neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession" (Pet. Brief at 36). It has also conceded that "if the taxpayer had transferred his own private papers to his attorney for purposes of preparing his defense, the Fifth Amendment privilege would have protected them from foreclosure" (Pet. Brief at 36, n. 16). The Court should accept these concessions since they are well founded.

An attorney's possession of papers on behalf of a client whom the attorney is representing should be deemed the "constructive possession" of the client sufficient to warrant assertion of the client's privilege. Unlike the transfer of documents to an accountant, the "transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given." *Couch v. United States,* 409 U.S. 322, 330 (1973) (Mr. Justice Marshall, dissenting opinion).

Furthermore, the transfer of records to an attorney who is representing the client in the matter under investigation is generally made in order to secure the informed advice of counsel as to the proper exercise of the privilege. *United States v. Judson,* 322 F.2d 460, 468 (9th Cir. 1963), without which the privilege might be lost. See *Maness v. Meyers,* 43 U.S.L.W. 4143, 4149 (Jan. 15, 1975). To deny an accused his Fifth Amendment privilege because the documents he seeks to protect have been turned over to his attorney would therefore

put a price on efforts to assert the privilege in an intelligent and informed manner and would put the accused to an unconstitutional Hobson's choice between his administratively conferred right to consult with counsel, on the one hand, IRS News Release IR-949 (1969), CCH Fed.Tax.Rptr. ¶6946; *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969); Cf. *Backer v. C.I.R.*, 275 F.2d 141, 144 (5th Cir. 1960), and his constitutional right not to incriminate himself, on the other. *Gardner v. Broderick*, 392 U.S. 273, 277 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967).

Finally, since access to counsel is an important aid to the effective exercise of the privilege, *Maness v. Meyers, supra*, a rule that would deny the privilege because the records were in the possession of an accused's attorney, would effectively increase the governmental compulsion upon the accused. The compulsion upon the accused is therefore not removed, but simply allowed to take a more subtle form. *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963). For these reasons, the Government's concession should be accepted and the attorney's possession should be deemed to be the client's possession for Fifth Amendment purposes.

5. The Government's argument that the papers involved in this case are not testimonial must be rejected. The accountant's workpapers are being sought for their content, i.e., for what they say and not for the physical properties of the paper, the ink or the accountant's handwriting. The Government's reliance on *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Dionisio*, 410 U.S. 1 (1973); and *United States v. Mara*, 410 U.S. 19 (1973) is therefore misplaced.

The argument that the Taxpayers will not be incriminated by production of the workpapers since the accountant, rather than the Taxpayers, can be used to authenticate them, must also be rejected. The scope of the privilege includes, but is not limited to, the testimonial character of the act of production. See *Curcio v. United States*, 354 U.S. 118, 125 (1957). It also embraces compulsory disclosure of documents extracted from an attorney in constructive possession for the accused where the accused is the source of the information contained in the writings, irrespective of who produces or authenticates them. Cf. *United States v. Nobles*, 43 U.S.L.W. 4815, 4818 (June 23, 1975); *Couch v. United States*, 409 U.S. 322, 333 (1973); *United States v. Dionisio*, 410 U.S. 1, 7, n. 6 (1973); *Schmerber v. California*, 384 U.S. 757, 763-764, 765 (1966); *Gouled v. United States*, 255 U.S. 298, 306 (1921). In that situation, the papers themselves contain communications of the accused, albeit reduced to writing by someone else, since the accused is the testimonial source of the information in the workpapers. Their compelled production is therefore forbidden, irrespective of who physically produces them.

The fact that the accountant may be able to authenticate the workpapers at a subsequent legal proceeding does not, of course, justify the use of legal process to obtain them if their contents would incriminate the accused. The Fifth Amendment protects against the incriminating disclosure itself and not just its admissibility into evidence. *Maness v. Meyers*, 43 U.S.L.W. 4143, 4148 (Jan. 15, 1975).

6. Lastly, the Government contends that an attorney has

no standing to assert his client's Fifth Amendment privilege when the attorney is served with a summons, even though the client could assert the privilege. The Court below held that there was no unanimity among the Courts on this issue, but found that "the weight of authority and reason supports the position that an attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege" *United States v. Kasmir*, 499 F.2d 444, 454 (5th Cir. 1974).

Those cases which have held otherwise, e.g., *Bouschor v. United States*, 316 F.2d 451, 458-459 (8th Cir. 1963), have all been based on a misreading of dicta in this Court's decision in *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906) which did not even involve an attorney-client relationship, but an employment relationship in which an employee tried to assert the privilege on behalf of a public entity which had no Fifth Amendment right. See discussion by Ainsworth, J., dissenting, in *United States v. White*, 477 F.2d 757, 766, n. 4 (5th Cir. 1973), *aff'd. per curiam en banc*, 487 F.2d 1335, *cert. den.* 419 U.S. 872 (1974). What these cases have overlooked is that an attorney, unlike any other agent, is capable of appearing on behalf of his client in legal proceedings and that, in effect, the attorney's appearance and assertion of the privilege is the client's appearance and assertion of the privilege, *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963), and is not an attempt by one person to assert someone else's privilege to protect himself. The fact that the privilege against self-incrimination is sometimes spoken of as a "personal" privilege of the claimant, *Couch v. United States*, 409 U.S. at 327, in

no way disposes of the question of whether a witness may assert his personal privilege through counsel or must do so himself. The attorney-client privilege is also a "personal" privilege, *Ex Parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922); 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961), but the attorney can and even has the duty to assert the privilege for and on behalf of his client whenever it may be applicable. *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956); *Ex Parte Lipscomb*, *supra*, 239 S.W. at 1103. Since it is well established that statements made by an attorney acting within the scope of his authority are binding as admissions of the client, *Laird v. Air Carrier Engine Service*, 263 F.2d 948 (5th Cir. 1959), one would think the client would be equally entitled to enjoy the beneficial effects of that advocacy.

Substantial policy reasons favor permitting an attorney to assert the privilege on behalf of his client. First, occasions can arise where the client is unavailable, but the attorney is summoned to produce the private papers of the client in his possession. In such circumstances, the attorney must be free to assert the privilege on his client's behalf or both the attorney and the client will be subjected to a significant inhibition of their freedom of consultation. Since it cannot be known in advance when such occasions will arise, the only way to avoid an inhibition on attorney-client consultations is to permit the attorney to assert the privilege for his client whenever the attorney is made the object of an inquiry directed at his client. This policy is the same one that permits the attorney to assert the attorney-client privilege on his client's behalf.

Another reason to permit the attorney to assert the privilege on his client's behalf is to avoid the loss of time, money and substantive rights to the client. While a refusal to permit the attorney to resist production of his client's records in his custody on the ground of standing does not appear to result in a waiver of the privilege since the client can move to suppress the evidence in a later criminal prosecution, *Donaldson v. United States*, 400 U.S. 517, 531 (1971), this Court has held that the motion to suppress is not the equivalent of the right not to produce at all. *Maness v. Meyers*, 43 U.S.L.W. 4143, 4147 (Jan. 15, 1975). Moreover, both the accused and the Government are forced to expend time and money on a prosecution that might otherwise never have been brought.

Finally, the standing issue is grounded in a matter of procedural convenience within the complete control of the Government and elevates form over substance. It is a well accepted practice in the federal courts to send a summons, a subpoena or a motion to produce to the party or witness himself, even though the document in question may be in the possession of his attorney. *In re Ruppert*, 309 F.2d 97, 98 (6th Cir. 1962); *Bifferato v. States Marine Corp. of Delaware*, 11 F.R.D. 44 (S.D.N.Y. 1951). Indeed, the Government represented to this Court in *Couch v. United States* that such was its practice. 409 U.S. 334, n. 18. Since the real parties in this case were the Taxpayers, the summons could just as easily have been served upon them as upon their attorney and no "standing" issue would have existed. The fact that the Government chose to serve the Taxpayers' attorney in this case is a mere matter of its own procedural convenience and should neither diminish

the Taxpayers' rights nor enhance the Government's.

The sole policy reason cited by the Government for requiring the Taxpayers to assert their right in person is simply untenable. The Government argues, relying on *Hoffman v. United States*, 341 U.S. 479 (1951), that they must have the accused assert his privilege in person so that the court may inquire into the basis of the claim (Pet. Brief at 41). However, *Hoffman* was not a standing case, but dealt instead with the question of whether a substantial danger existed for self-incrimination if the accused answered the questions put to him. Moreover, *Hoffman* involved oral testimony, *not* documentary evidence. In the instant case, the Fifth Circuit correctly observed that the "incriminating character of the materials sought here has never been put in issue" *United States v. Kasmir, supra*, 499 F.2d at 451, n. 4. The oral testimony of the accused could hardly be expected to shed light on the incriminating character of the papers. But even if that were a genuine possibility, the Government was free to subpoena the Taxpayers and call them as witnesses in the case. It made no effort to do so, preferring to hide this objection from the court and opposing counsel until after the close of evidence in the case (A. 69).

To date, this Court has held that "in the event the taxpayer is not a party to the summons before the hearing officer, he . . . *may* intervene" *Reisman v. Caplin*, 375 U.S. 440 (1964) (emphasis added). This Court has *never* held that he *must* intervene in order to assert his rights when the summons is directed to his attorney. However, if that should be the Court's ruling in this case, Taxpayers ask that it be made prospective

only and that they be allowed to secure the benefit of this Court's ruling on the merits by intervening within a stated period of itme after the case is remanded to the District Court.

ARGUMENT

I.

SEVERAL OF THE ISSUES RAISED BY THE GOVERNMENT IN ITS BRIEF ARE NOT PROPERLY BEFORE THIS COURT FOR REVIEW BECAUSE THEY WERE NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW, WERE NOT SET FORTH OR FAIRLY COMPRISED WITHIN THE QUESTIONS PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI, AND WERE NOT PRESENTED IN A BRIEF THAT WAS TIMELY FILED UNDER THIS COURT'S OWN RULES.

Among the issues that the Government has raised in its Brief for review by this Court are: (1) the question whether accountant's workpapers are the papers of a collective entity to which no claim of privilege may attach (Pet. Brief at 14, 21-23) and (2) the question whether production of accountant's workpapers would be testimonial or communicative in nature (Pet. Brief at 16, 33-35). Important and interesting as these questions may be, however, Taxpayers would point out that they were neither presented to nor considered by the courts below.

An examination of the Government's Brief filed in the District Court, a copy of which has been included in the Appendix in this Court (A. 30-33), and an examination of

the argument of counsel for the Government (A. 68-69, 75-77), will show that neither of the questions mentioned above was ever raised in the court of first instance. There was likewise no reference in the Court of Appeals to the collective entity exception to the Fifth Amendment privilege, or to any contention that production of accountant's workpapers would not be testimonial or communicative in nature. (See Brief For the Appellees In the United States Court of Appeals for the Fifth Circuit, copies of which have been lodged with the Clerk of this Court.) Indeed, the total absence of these issues in the lower court proceedings is evident not only from the fact that neither issue is discussed in the opinions rendered below in No. 74-611, but also by the very simple fact that none of the collective entity cases from *Wilson v. United States*, 221 U.S. 361 (1911) through *Bellis v. United States*, 417 U.S. 85 (1974), relied on so extensively by the Government in this Court, and none of the authorities on the testimonial or communicative nature of the privilege to which this Court's attention is now directed, e.g., *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Dionisio*, 410 U.S. 1 (1973); and *United States v. Mara*, 410 U.S. 19 (1973), are so much as mentioned in any of the Government's Briefs filed in the lower courts. Under all the circumstances, Taxpayers submit that these issues are being presented for the first time on appeal to this Court, in derogation of an orderly appellate process, and that such issues are therefore not properly before this Court for review.[1]

[1] An examination of the Government's Briefs in the lower courts will show that the Government relied principally on three theories in opposing Taxpayers' claim of privilege. It argued, relying on *Couch v.*

It is well established that in cases of this kind, this Court sits as a Courtof review, not a Court of original jurisdiction, and therefore only in the most exceptional circumstances will it entertain questions not raised or considered by the lower courts. *United States v. Estate of Donnelly*, 397 U.S. 286, n. 5 (1970); *Lawn v. United States*, 335 U.S. 339, 362, n. 16 (1958); *Dunigan v. United States*, 274 U.S. 195, 200 (1927); *Tyrrell v. District of Columbia*, 243 U.S. 1 (1916). Cases involving the Fifth Amendment privilege fall within this rule, *United States v. Nobles*, 43 U.S.L.W. 4815, 4817, n. 4 (June 23, 1975), and it binds the Government no less than private litigants. *United States v. Hoth*, 207 F.2d 386, 389 (9th Cir. 1953). There are no exceptional circumstances in this case which would justify consideration of issues not properly preserved in the courts below. See *Lawn v. United States, supra*,

Footnote 1 continued:

United States, 409 U.S. 322 (1973), that Taxpayers could not assert their privilege because they did not own the records in question; it argued that enforcement of the summons would not exert compulsion against the Taxpayers since the records were not in their possession, but in the possession of their attorney; and it argued that possession by Taxpayers and their attorney was not "rightful" because possession of the records had been transferred to the Taxpayers after they learned of the Government's investigation. None of these arguments is presented on this appeal. The ownership theory has been abandoned, and reappears only as one of the pegs on which to hang the collective entity argument; the transfer of possession to the attorney has been conceded neither to enlarge nor diminish the Taxpayers' rights (Pet. Brief at 36); and the theory that a transfer is not "rightful" if made after knowledge is acquired of a Government investigation, while seemingly covered by the questions presented for review, has not been argued in the Government's Brief, and is therefore abandoned. *Russell v. United States*, 369 U.S. 749, 754, n. 7 (1962); *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 651, n. 4 (1950). In fact, except for the issue of an attorney's standing to assert the privilege on behalf of his client, the theories on which the Government says it should prevail in this Court bear no resemblance to the arguments it made in the courts below.

335 U.S. at 362, n. 16. Cf. *United Brotherhood, C & J v. United States*, 330 U.S. 395, 412 (1947). Consequently, these issues should not be considered on review by this Court.

Taxpayers also contend that the above-mentioned issues were not adequately set forth in the Government's Petition for Writ of Certiorari nor fairly comprised within the Questions Presented as required by Rule 23(1)(c) of this Court. The only question presented, apart from the standing issue, was:

> Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to produce an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

The thrust of the question presented was the effect, on the claimant's right to invoke his privilege, of a transfer from the accountant to the claimant and thereafter from the claimant to his attorney. These were the issues briefed and argued by the Government in the lower courts. The question does not, however, adequately set forth or comprise the argument that accountant's workpapers belonging to a collective entity are unprivileged no matter who holds them, or the argument that the production of an accountant's workpapers is non-testimonial or non-communicative in nature.

A comparison of the question presented in this case with the Government's efforts to raise similar questions in other cases shows that the Government has had no difficulty in the past in explicitly stating its position when such position was

known to it at the time the Petition for Writ of Certiorari was filed. In *Bellis v. United States,* for example, the argument that a law firm's financial records were not subject to a claim of privilege because the papers in question were the papers of the partnership was stated as follows:

> Whether a former partner in a dissolved law partnership is entitled to invoke the Fifth Amendment privilege against self-incrimination as a ground for refusing to comply with a grand jury subpoena to produce business records maintained by the partnership while he was a member, where the records had come into his possession after the dissolution.

Government's Brief in *Bellis* at 2.

The thrust of the question in *Bellis* was whether the individual attorney had a right to invoke the privilege with respect to business records that were "maintained by the partnership while he was a member." In contrast, the question presented in this case doesn't even mention the fact that any partnership or other business entity had any connection with the accountant's workpapers. Moreover, unlike the *Bellis* case, which discussed the nature and size of the partnership in the text of the petition, and made the importance of such fact clear to the Court, the text of the Petition here is devoid of any such discussion. The legal argument gives no indication whatever that a partnership or other collective entity is involved or that such involvement creates an issue of any importance.

The presentation of the dichotomy between testimonial and non-testimonial evidence in the Petition is impossible to find. This issue is not once mentioned anywhere in the Petition, nor are any of this Court's cases on the subject so much as cited.

Under the circumstances, it is the Taxpayers' position that the question presented in this case was completely inadequate as a means for informing Respondents or this Court of the Government's intentions to raise either the collective entity concept or the dichotomy between testimonial and non-testimonial evidence, particularly in view of the fact that neither argument had been made in the lower courts. Indeed, Respondents' complete ignorance of the Government's intentions in this regard, even after reading its Petition, is seen from the Brief of Respondents in Opposition in which Taxpayers discussed what they conceived to be the issues presented for review. Not until receipt of the Government's Brief was it apparent that the Government's entire theory of the case had been radically altered before this Court.

Taxpayers submit that inclusion of the issues mentioned above in the Government's Brief is contrary to the rule that this Court's "consideration will be limited to the question presented by the petition for the writ of certiorari," *Mazer v. Stein,* 347 U.S. 201, 208 (1954), and constitutes an impermissible attempt to smuggle new issues into the case not covered by this Court's original grant of the writ. Rule 40(d)(2) of the Supreme Court Rules clearly provides:

> . . . the brief may not raise additional questions or change the substance of the questions already presented in those documents [the jurisdictional statement or the petition for certiorari].

Moreover, this Court has admonished:

> We disapprove the practice of smuggling additional questions into a case after we grant certiorari.

Irvine v. California, 347 U.S. 128, 129 (1954). See also, *Lawn v. United States, supra,* 355 U.S. at 362, n. 16. For the reasons stated, Taxpayers submit that the Government's efforts to enlarge the issues properly before this Court should be rejected.

Finally, Taxpayers object to the Government's complete disregard of this Court's rules with respect to the timely filing of briefs. As indicated in our letter of June 18, 1975, to the Clerk of this Court (See Appendix to this Brief), the Government received three extensions of time for the filing of its Brief until and including April 30, 1975. We did not oppose and do not complain of those extensions here. However thereafter, having been informed by the Clerk of this Court that no further extensions would be granted, and without requesting any, the Government simply failed to file its Brief for an additional *six weeks* until June 16, 1975. No sanctions were imposed by the Clerk of this Court for late filing.

We object to the Government's total disregard of Rule 41 of this Court and to its failure to offer any explanation or justification for its conduct.

Under all the circumstances, we request that the issues not properly raised by the Government in the courts below, not adequately preserved in the questions presented to this Court, and argued in a Brief that was not timely filed, should not be considered on review by this Court.

In the alternative only, we ask that all costs of this appeal be charged against the Government irrespective of its outcome.

II.

THE PAPERS INVOLVED IN THIS CASE ARE NEITHER THE PAPERS OF A COLLECTIVE ENTITY NOR ARE THEY HELD BY THE TAXPAYERS IN A REPRESENTATIVE CAPACITY.

In shifting its attack from the possession of the records by the Taxpayers' attorney to "the essential character of the papers at issue" (Pet. Brief at 23), the Government invokes a line of decisions in which this Court has rejected the applicability of the privilege against self-incrimination to papers of collective entities such as corporations, associations and partnerships. *Wilson v. United States,* 221 U.S. 361 (1911); *Baltimore & Ohio Railroad Co. v. Interstate Commerce Commission,* 221 U.S. 612 (1911); *Wheeler v. United States,* 226 U.S. 478 (1913); *Essgee v. United States,* 262 U.S. 151 (1923); *United States v. White,* 322 U.S. 694 (1944); *Rogers v. United States,* 340 U.S. 367 (1951); *Curcio v. United States,* 354 U.S. 118 (1957); *Bellis v. United States,* 417 U.S. 85 (1974).

As this Court recently noted, this "line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." *Bellis v. United States,* 417 U.S. at 88. The Government argues that the accountant's workpapers involved in this case "obviously were not private papers of the taxpayers and, we submit, did not become so upon being handed over by the accountants to the taxpayers or upon being handed over by the latter to their attorneys" (Pet. Brief at 23).

Taxpayers agree with the Government that the "essential character" of these records cannot be changed either by a transfer from the accountant to the Taxpayers, or by a transfer from the Taxpayers to their attorney, and Taxpayers have never so argued.[2] However, the Government, in thus misstating Taxpayers' position, itself begs the question regarding the essential character of the papers here in issue.

It is the Government's position that accountant's workpapers cannot be made the subject of a claim of self-incrimination even if they are possessed by the accused himself at the time the summons is served because the "accountant's workpapers . . . were *created* by the Taxpayers' accountant . . . and were *owned* and *maintained* by the accountant until the commencement of the investigations" (Pet. Brief at 23) (emphasis added). From this statement, we understand the Government's position to be that records which are (1) owned by a collective entity, (2) created by a member of a collective entity, and (3) in the possession of the collective entity at some point prior to the issuance of a summons, cannot be made the subject of a claim of self-incrimination under the collective entity cases. However, Taxpayers submit that these criteria have nothing to do with the essential character of the papers at issue, nor with the purpose and policy behind the collective entity exception. A

[2] The constitutional significance of the transfer results from the return of information in the records to the Taxpayers' "private enclave" and the consequent restoration of the element of personal compulsion that was found missing in *Couch v. United States,* 409 U.S. 322 (1973). It has never been Taxpayers' position that such transfer changed the "essential character" of the records for purposes of the collective entity exception since, as previously mentioned, that concept and the authorities urged in support thereof in this Court were never discussed in the courts below.

close analysis of the cases relied upon by the Government shows that this narrow exception to the Fifth Amendment for organizational or institutional papers is based on the fact that such papers describe or refer to the activities and transactions of a collective entity (which itself has no Fifth Amendment privilege) and were initially created on its behalf and for its benefit. These cases are *not* premised upon the organization's ownership of the papers, nor upon the fact that the papers may have been created or stored by one of its members.

A. The Essential Character Of Papers As Organizational Papers Is Not Determined By Their Ownership, Authorship Or Prior Custodial History.

A review of this Court's decisions from *Wilson v. United States,* 221 U.S. 361 (1911) to *Bellis v. United States,* 417 U.S. 85 (1974), reveals that the organizational papers which have been excluded from protection under the Fifth Amendment have all consisted of papers that described the activities and transactions of the collective entity for whose benefit they were made and were, therefore, quite different from the kind of papers involved in this case which have reference solely to the activities of natural persons and were made on their behalf.

In *Wilson v. United States, supra,* the Court said of the letter-press copy books there at issue: "They have reference to business *transacted for the benefit of the group of individuals* whose association has the advantage of corporate organization." 221 U.S. at 382 (emphasis added). In applying this standard, the Court was careful to distinguish between records relating to the personal affairs of a corporate officer, copies of which

were in the possession of the corporation, and documents "relating to the business and affairs of the corporation." 221 U.S. at 378. While sustaining the Government's right to obtain the latter class of documents, the Court found that the personal correspondence of a corporate officer was not covered by the subpoena for corporate documents and was subject to exclusion by the Court even though copies of such personal letters were contained in and made a part of the corporate records. As the Court stated:

> Had the appellant merely sought to protect his personal correspondence from examination, it would not have been difficult to have provided, under the supervision of the court, for the withdrawal of such letters from scrutiny. Indeed, on the hearing of the second presentment, the court suggested their removal from the books.

221 U.S. at 378. See also *Wigmore on Evidence, Third Edition*, Vol. 8, Section 2259b, where Dean Wigmore notes that ". . . for any documents therein that concern only the 'private or personal' affairs of the officer, the Court may direct their 'withdrawal from scrutiny'."

The *Wilson* decision is also significant in connection with the Government's argument that there is relevance in the identity of the person who created the document in question. In *Wilson*, the Court expressly rejected the notion that the character of books and records for Fifth Amendment purposes was in any way limited or enlarged by the question of authorship. As the Court stated:

> It is at once apparent that the mere fact that the appellant himself wrote, or signed, the official letters copied into the books, neither conditioned nor enlarged his privilege. *Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person* (emphasis added).

221 U.S. at 378. See also *People v. Myers*, 35 Ill.2d 311, 220 N.E.2d 297, 310 (1966).

In *Baltimore & Ohio Railroad Company v. Interstate Commerce Commission*, 221 U.S. 612 (1911), decided in the same term as *Wilson*, the Court was called upon to determine whether the collective entity exception was applicable to employee time reports kept by the Railroad. In holding that the exception and not the privilege applied to the records in issue, the Court stated: ". . . *the transactions to which the required reports relate are corporate transactions*, subject to the regulating power of Congress." 221 U.S. at 622 (emphasis added).

In *Wheeler v. United States*, 226 U.S. 478 (1913), the subpoena called for "all the cash books, ledgers, journals, and other books of accounts of the company, and all copies of letters and telegrams of Wheeler & Shaw, Incorporated, whether signed or purporting to be signed by the corporation or by its president or treasurer in its behalf." 226 U.S. at 483. However, the corporation had previously been dissolved and its books and records were both owned and possessed by Wheeler and Shaw, two of its former officers, at the time the subpoena was served. The defendants argued that their ownership and possession distinguished their case from *Wilson v. United States, supra*. The Court conceded that the corporation had left its books and papers "in the possession of the defendants" and it agreed with the defendants that "for many purposes such books belong[ed] to them." 226 U.S. at 490. However, it rejected their

attempt to distinguish the *Wilson* case on grounds of ownership or possession since *neither* factor altered "the essential character of the books and papers." 226 U.S. at 489. As the Court stated:

> We are unable to see that this case differs in principle from that one. It is true the corporation in the present case had ceased to exist, but its books and papers were still in existence and *were still impressed with the incidents attending corporate documents.* Wheeler and Shaw had been officers of the corporation, and the books of the company had, before the dissolution, been made over to them: *but this did not change the essential character of the books and papers,* or make them any more privileged in the investigation of crime than they were before. It was the *character of the books and papers as corporate records and documents* which justified the court in ordering their production, as this court ruled in the Wilson case. We think the character of the books was not changed for this purpose, because the corporation had gone out of existence after making over the books to the defendants. 226 U.S. at 489 (emphasis added).

See also *Grant v. United States,* 227 U.S. 74, 80 (1913) which held that: "Whether or not the title to them had passed to Burlingame when the Ellsworth Company ceased to do business, their essential character was not changed."

The foregoing cases illustrate a significant contradiction in the Government's position that ownership, authorship and the pre-summons possession of accountant's workpapers by the accountant is what determines their essential organizational character. If that were true, how could it be said that after ownership and possession passed to another, "their essential character was not changed"? *Grant v. United States,* 227 U.S.

at 80. Surely if the "essential character" of papers was actually determined by their ownership, authorship or pre-summons possession, a subsequent change in ownership or possession would have some effect on their "essential character." However, since this Court has clearly stated on two occasions that alteration of ownership and possession does *not* change the essential character of the papers, it defies logic and common sense to adhere to the Government's position that ownership and possession were among the factors that initially determined the essential character of the papers.

We submit that this Court has never adopted the contradictory rationale offered by the Government for ascertaining the kinds of papers that fall within the collective entity exception, and that the reason corporate "books and papers were still impressed with the incidents attending corporate documents" even after a change in their ownership and possession, and irrespective of their authorship, is that ownership, possession and authorship were not the factors that initially determined the essential corporate character of the documents. Rather, the corporate character of the documents was determined by the corporate transactions which such documents described and by the fact that the documents were created on behalf of the corporate entity and in furtherance of its purposes. These were the incidents of their corporate character and they remained unchanged no matter who subsequently owned or possessed them or who had initially written them.

Our analysis of the collective entity exception is supported by *United States v. White, supra,* one of this Court's most ex-

tensive expositions of the doctrine. In that case, a union was subpoened to produce "copies of its constitution and bylaws and specifically enumerated union records showing its collections of work-permit fees. . ." 322 U.S. at 695. The Court of Appeals had sustained the claim of privilege tendered by the "assistant supervisor" of the union, principally on the ground that the records of an unincorporated labor union "were the property of all of its members." 322 U.S. at 696. Although this Court acknowledged that "title may be nominally in the names of [the union's] members or trustees," 322 U.S. at 702, it nonetheless reversed the Court of Appeals and implicity rejected ownership as a necessary condition for the exercise of the privilege. As this Court recently said of the *White* case: "Although the Court was aware that the individual members might legally hold title to the union records, the Court characterized this interest as 'nominal' rather than a significant personal interest in them." *Bellis v. United States, supra,* 417 U.S. at 93.

The essence of the *White* decision can be found not in the intricacies of legal title, but in the Court's distinction between "organized institutional activity" and "wholly individual activity." 322 U.S. at 701. White failed in his Fifth Amendment claim because he was unable to demonstrate any "significant personal interest" or constitutionally meaningful nexus between himself as an individual and the documents which he sought to shield with his personal privilege. Since the union records that were subpoened related solely to the group activity of the union and not to the individual activity of any of its members, the only interest White had in such documents was the interest he shared in common with all members of the union, i.e., a

collective interest, not a personal one. Denial of the privilege in such circumstances was largely dictated by the legitimate concern that the privilege not be used to insulate "institutional activity" from governmental regulation where none of the fundamental personal values of the privilege were implicated. As the Court stated:

> Were the cloak of the privilege to be thrown around these *impersonal records and documents,* effective enforcement of many federal and state laws would be impossible. See Hale v. Henkel, supra, 201 U.S. 70, 74, 26 S.Ct. 377, 379, 50 L.Ed. 642; 8 Wigmore On Evidence, 3rd Ed., §2259a. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations" (emphasis added).

322 U.S. at 700.

We think it significant that in the course of its decision the Court repeatedly emphasized that the papers in issue were "*official union documents* held [by the accused] in his capacity as a representative of the union" 322 U.S. at 704 (emphasis added), and that "the subpoena duces tecum was directed to the union and demanded the production *only* of its *official* documents and records" *Id.* (emphasis added). The Court did not differentiate between "official union documents" and other kinds of union papers or between "impersonal records and documents" and more personal ones, but it certainly left open the possibility that records of a truly personal nature to individual union members, even if contained in union files, might be in a

different category from the kind of union records that were then and there under subpoena. In fact, *White* might be said to suggest the proposition that just as the nominal property interest of the union members was insufficient to overcome the essentially institutional character of the union's official records, so also should any nominal property interest of a collective entity in documents relating solely to the activity of a natural person be insufficient to overcome the essentially personal character of such documents so long as the accused can demonstrate a significant personal interest in them.

The legitimacy of this proposition has been recently illustrated by this Court's decision in *Bellis v. United States*, 417 U.S. 85 (1974). Although finding against the accused in that case, this Court was careful to note that the applicability of the collective entity exception to a law firm's financial records did not necessarily mean that the partnership's client files would also be unprotected by the Fifth Amendment. As the Court observed:

> *Significantly*, the District Court here excluded any client files from the scope of its order. See n.1, supra. A different case might be presented if petitioner had been ordered to produce files containing work which he had personally performed *on behalf of his clients, even if these files might for some purposes be viewed as those of the partnership* (emphasis added).

417 U.S. 85, 98, n. 9. See also *U.S. v. James L. Cobb, Jr.*, 75-2 CCH Tax Rptr. ¶9534 (6th Cir. 1975).

There is, of course, no question that accountant's workpapers are included in the category of "client files." Such papers not only consist of "work which [the accountant] has personally

performed on behalf of his client," they consist of papers that are routinely kept separate and apart from the accounting firm's own financial records. Moreover, the fact that accountant's workpapers like other "client files" may be the property of a collective entity cannot, in light of *Bellis*, be of decisive constitutional significance. This Court found the status of such records to present an unresolved question, "even if these files might for some purposes be viewed as those of the partnership." *Id.* Therefore, *Bellis* follows *White* in impliedly finding ownership of summoned records to be of no more than "nominal" significance in determining the applicability of the privilege. As this Court has said, more explicitly in another context, of the relationship between ownership and the purposes and policies behind the privilege:

> To tie the privilege against self-incrimination to a concept of ownership would be to draw a meaningless line. It would hold here that the business records which petitioner actually owned would be protected in the hands of her accountant, while business information communicated to her accountant by letter and conversations in which the accountant took notes, in addition to the accountant's workpapers and photocopies of petitioner's records, would not be subject to a claim of privilege since title rested in the accountant. Such a holding would thus place unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections.

Couch v. United States, 409 U.S. 322, 332 (1973).

The Government's collective entity argument in this case with its undue emphasis on ownership is no less an attempt to divert the inquiry from the basic purposes of the Fifth Amend-

ment's protections than was the taxpayer's argument in *Couch*. Indeed, the Government's argument here is basically the same argument that was made in *Couch*, but packaged to suit the Government's needs, rather than those of the accused. However, as we believe we have demonstrated, there is no support in this Court's prior decisions for the proposition that ownership, authorship or the pre-summons possession of papers by a collective entity dictates the inapplicability of the privilege against self-incrimination. Rather, the privilege has been held inapplicable in the collective entity cases cited by the Government because the accused had no "significant personal interest" in the papers in question. In those cases, the *only* connection that the accused was able to demonstrate between himself and the papers under summons was a representative relationship to the organization on whose behalf the papers had been created. Such a basis for invoking the privilege was justifiably deemed constitutionally inadequate.

The facts of this case are very different. The accountant's workpapers which the Government seeks to force the Taxpayers to produce are papers in which the Taxpayers have always enjoyed a significant personal interest, a personal interest which *clearly antedates any of the transfers about which the Government complains.*

To begin with, these records are about the personal affairs of natural persons who *have* a constitutional privilege to assert. They describe *their* personal transactions, not those of the accounting firm.

Secondly, the workpapers were created by the accountant *on behalf of the Taxpayers* in order to make an orderly record of

the *Taxpayers'* business transactions. Irrespective of who physically created them or who now owns them, they were created as a means for implementing the services which the Taxpayers had retained the accountant to perform and in discharge of their commission to him. In creating them, the accountant therefore acted for the benefit of the Taxpayers; not vice versa. As the intended beneficiaries of the accountant's work, Taxpayers have a very definite personal and non-representative interest in the workpapers.

Thirdly, the Taxpayers, *in their individual capacities*, provided the information contained in the workpapers. As the Government admits ". . . the workpapers at issue were prepared by the accountant *on the basis of information disclosed to them by their taxpayer-clients* . . ." (Pet. Brief at 31) (emphasis added). Therefore, irrespective of any mathematical functions which the accountant may perform, the workpapers are fundamentally the Taxpayers' own utterances, once removed. As such, the Taxpayers have a personal interest in the records of substantial constitutional significance since compelling production of these records would in a very real sense compel Taxpayers to bear witness against themselves. Cf. *United States v. Nobles*, 43 U.S.L.W. 4815, 4818 (June 23, 1975).[3] They

[3] This Court stated in *Nobles*:

> Respondent did not prepare the report, *and there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator.* The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communications from him (emphasis added).

43 U.S.L.W. at 4818. The very opposite is true of the workpapers involved in this case because they clearly reflect information that has been conveyed to the accountant by the Taxpayers.

would be providing their own statements as recorded or reduced to writing by the accountant. Such a compelled disclosure lies at the very heart of the Fifth Amendment privilege.

Finally, as discussed more fully below, the Taxpayers hold the accountant's workpapers in a personal, not a representative capacity.

For the reasons stated, we submit that on the facts of this case, the accountant's workpapers are not the papers of a collective entity in any constitutionally significant sense, even if they may be viewed as papers of the accounting firm "for some purposes" such as ownership which has only nominal significance in a Fifth Amendment context. To hold otherwise will simply put a premium on the use of an accountant who is a sole practitioner, since his business files would be protected, *Bellis v. United States, supra,* 417 U.S. at 87-88, a result that will neither reflect "the essential character" of the papers in issue, nor accomplish any constitutionally meaningful objective.[4]

B. The Accountant's Workpapers Are Held By The Taxpayers In This Case In A Purely Personal Capacity, Not In A Representative Capacity, And The Collective Entity Cases Are Therefore Inapplicable.

In *United States v. White,* 322 U.S. 694, 699 (1944), this Court stated that ". . . the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*" (emphasis added). The Government has repeatedly emphasized the absence of any ownership rights in the Taxpayers with respect to their accountant's workpapers, but it has completely failed to confront the implications of the italicized disjunctive statement in *White* which clearly recognizes that something short of private property is sufficient to invoke the constitutional privilege against self-incrimination. Indeed, this Court itself has emphasized the italicized language in *Couch v. United States, supra,* 409 U.S. at 330, n. 10, and said of *United States v. Cohen,* 388 F.2d 464, 468 (9th Cir. 1967), in which accountant's workpapers were held but not owned by the taxpayers in their personal capacity, that "the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate" 409 U.S. at 330, n. 12.

The Government's only response to the assertion that the Taxpayers' records in this case were held in a purely personal capacity, is the somewhat cryptic observation that "where the claimant has physical possession but cannot assert that they are his own personal papers . . ., the claimant's possession is custodial rather than personal" (Pet. Brief at 21). The Government seemingly enlarges upon this point by subsequently saying that the possession of the Taxpayers in this case "could at best be described as a gratuitous bailment" (Pet. Brief at 27). These statements are apparently intended to demonstrate that the accountant's workpapers in this case are beyond the reach of the privilege and within the collective entity exception, because they are somehow not held in a purely personal capacity. If that is the Government's purpose, however, it is wide of the mark.

[4] The Court should note that the record in this case does not indicate whether the accounting firm of Tannebaum, Bindler & Lewis is a sole proprietorship, a partnership or a professional corporation. Nor does it indicate such facts as the size of the firm or the number of its employees. Cf. *Bellis v. United States, supra.*

There is no doubt that papers which are possessed by someone other than the true owner will be the subject of a bailment of some kind. "In general, in bailments possession of the property bailed is severed from the ownership." 8 C.J.S., ***Bailments***, §520, p. 368. But this is simply the inevitable consequence of any situation in which ownership and rightful possession reside in different persons. It does not prove that a non-owner possessor or bailee holds property in other than a personal capacity.

There is no support in the *White* opinion for the thesis that possession in a purely "personal capacity" is in any sense exclusive of or inconsistent with possession by a non-owner bailee or possession in a custodial capacity. The term "possession in a purely personal capacity" in *White* was intended to communicate the constitutional insufficiency of possession in a "representative capacity" since possession of papers in a representative capacity was deemed an inadequate basis for the use of a purely personal privilege. As such, possession in a "personal capacity" was juxtaposed to possession in a representative capacity and had nothing to do with any distinction between possession by an owner and a non-owner. As this Court stated in *Bellis v. United States, supra,* in describing the scope of the collective entity exception as expounded by the *White* case:

> . . . the records subpoened must in fact be organizational records *held in a representative capacity* (emphasis added).

417 U.S. at 93.

Assuming, for the sake of argument, that Taxpayers' possession of the accountant's workpapers in this case constituted no more than a gratuitous bailment, as the Government argues, the existence of such a bailment would in no sense be inconsistent with Taxpayers' possession of such papers in a personal and non-representative capacity since a bailment does not necessarily or even generally include an agency. 2A C.J.S. *Agency* §8, pp. 563-564. As the Supreme Court of Texas has stated:

> While an agent is frequently a bailee, *generally in cases of bailment the agency relation does not exist as the bailor ordinarily has no control over the bailee and is not responsible to others for his acts* (emphasis added).

English v. Dhane, 294 S.W.2d 709, 711 (Tex. 1956).

The record in this case shows that the accounting firm of Tannebaum, Bindler & Lewis relinquished to the Taxpayers the "rightful, indefinite and legitimate possession" of the documents and files in its possession (A.17). There is no evidence that in conveying the records to the Taxpayers the accountants sought in any way to limit or control the manner in which Taxpayers would make use of them.[5] Nor is there any evidence or finding that the records in this case were transferred to the Taxpayers for the benefit of the accountants. All indications are that the transfer was for the sole benefit of the Taxpayers.[6]

---

[5] Cf. *English v. Dhane, supra,* 294 S.W.2d at 711, where the Court said:
The record is wholly void of any evidence that English had claimed or exercised any control over Peters in the latter's operation of the car at the time in question, and in that situation there can be no agency.

[6] Cf. *United States v. Fisher,* 500 F.2d 683, 696 (3rd Cir. 1974) (Hunter, J., concurring in part and dissenting in part):
It is undisputed that the "analyses" were prepared for the Goldsmiths from their own records and papers and pertained to their own business affairs. They obtained the "analyses" from Berson

Since it is well established that a bailee who takes possession of property in furtherance of his own interests rather than in furtherance of the interests of the bailor is not the bailor's agent, *Gathright v. Carl Markley Motor Co.*, 146 S.W.2d 307, 311 (Tex. Civ. App.—Beaumont, 1940, no writ); *Bertrand v. Mutual Motor Co.*, 38 S.W.2d 417 (Tex. Civ. App.—Eastland, 1931), it is clear that the records in this case were not held by the Taxpayers in a representative capacity on behalf of the accountants.[7] Indeed, the unlikelihood of such a relationship existing is further illustrated by the fact that the accountant is acting for and on behalf of the Taxpayers, not the other way around. Under all the circumstances, the Government's argument that Taxpayers' possession of the accountant's workpapers in a custodial capacity or as a bailment somehow constitutes possession in other than a "personal capacity" must be rejected, and with it, we submit, any basis for holding that the collective entity cases from *Wilson* to *Bellis* have any proper application to the case at bar.

C. Where The Accused Has A Significant Personal Interest In The Records In Question, That Interest May Not Be Subordinated To Or Disregarded In Favor Of The Governmental Interest In Regulating Collective Entities Without Seriously Impairing The Fundamental Values Protected By The Fifth Amendment.

The collective entity exception was created to meet the

---

footnote 6 continued:

for their own personal purposes and did not hold them in furtherance of any objective of Berson, or as agent of Berson.

[7] See *Van Brunt & Davis Co. v. Harrigan*, 8 S.D. 96, 98, 65 N.W. 421, 422 (1895), where the Court stated:

The term "representative capacity" is a well-understood term, and only applies to a party acting for and in behalf of some other party or estate, and not for himself personally.

limited objective of preventing a purely private privilege from being extended to impersonal records in which the claimant had no significant personal interest. So limited, it is beneficial. Like many valid principles, however, it is potentially harmful when applied to facts at variance with the necessities which engendered it. There is no denying the significant personal interests which Taxpayers have in an accountant's workpapers, the contents of which they have provided to the accountant. Such papers, like the notes a psychiatrist takes at a session with a patient, like notes a clergyman might make in the confessional, or like an attorney's memorandum to the file concerning a client's affairs, may in a proprietary sense and in terms of authorship be the professional's, but they are in substance the personal record of the patient, parishioner or client. No valid constitutional principle is served by making the availability of the Fifth Amendment privilege turn on whether the professional who is consulted is a member of a professional corporation or partnership. That fact may be significant in terms of the availability of the privilege to the professional, for he has chosen the manner in which he shall do business, but it should not control the constitutional rights of those he serves.

The importance of this distinction may be seen in the facts of the *Boyd* case, even though it antedated the principle here under discussion. The invoice in that case was at one time owned, prepared and possessed by the Union Plate Glass Company which issued it to E. A. Boyd & Sons. Conceding for the sake of argument that E. A. Boyd & Sons would today have no privilege since it operated as a partnership, would the privilege have been disallowed even to a natural person who had come

into possession of the invoice in a non-representative capacity simply because the issuer of the invoice conducted its business as a collective entity? We think not. In essence, however, that is the thrust of the Government's argument in this case.

Taxpayers submit that there are few records in this world that were not at some point in time prepared, connected with or held by a collective entity. Invoices, stock certificates, bills of sale, contracts, notes, letters and other documents may have both personal and organizational characteristics. But that should not render them unprivileged in the hands of a natural person.[8]

We do not, of course, downgrade the legitimate interests of the Government in the regulation of collective entities. The collective entity cases themselves manifest that concern, although in a context where the Government's regulatory interest was considerably stronger than it is here because its inquiry was limited to records describing the activities of the collective entity. Whatever the strength of that interest, however, the collective entity cases are not bottomed on the proposition that the "significant personal interests" of the accused are to be swept away in the tide of governmental necessity. Rather the authorities relied on by the Government are based primarily on the complete absence of any significant personal interest or constitutionally meaningful nexus between the accused and the records in question.

In this case, the requisite personal interests of the accused

[8] Cf. *Boyd v. United States*, 116 U.S. 616 (1886) (company invoice); *Ex Parte Wilson*, 47 S.W. 996 (Tex. 1898) (partnership bill of sale); *Chambliss v. State*, 231 P.2d 711, 713 (Okla. 1951) (State motor fuel license).

are present. In this situation, we submit that the significant personal interests of the accused may not be subordinated to or disregarded in favor of the governmental interest without seriously impairing the fundamental values protected by the privilege.

III.

ACCOUNTANT'S WORKPAPERS DO NOT BECOME PUBLIC OR QUASI-PUBLIC IN NATURE SIMPLY BECAUSE PORTIONS OF THEIR CONTENTS MAY HAVE PREVIOUSLY BEEN DISCLOSED IN THE TAXPAYERS' INCOME TAX RETURNS.

Closely related to the Government's argument that the accountant's workpapers in this case are the papers of a collective entity is the argument that they are not the private papers of the Taxpayers. Relying primarily on *Boyd v. United States*, 116 U.S. 616 (1886), and this Court's decision in *Couch*, the Government argues that only the private papers of the accused are within the protection of the privilege (Pet. Brief at 30-33). Workpapers of an accountant, it contends, are not the private papers of the accused because they are prepared by an outside accountant (Pet. Brief at 31) and because much of the information they contain has been previously disclosed in the Taxpayers' income tax returns. In the Government's opinion, these circumstances defeat any reasonable expectation of privacy which the Taxpayers might have in the workpapers and the subsequent return of the workpapers to their custody does not reconvert them to the private papers of the accused so as to make them subject to a claim of privilege (Pet. Brief at 33).

The first part of the Government's argument regarding the

preparation of workpapers by a person other than the Taxpayers is clearly disposed of by *Wilson v. United States, supra,* 221 U.S. at 378, where this Court flatly stated: "Where one's *private documents* would tend to incriminate him, the privilege exists though they were actually written by another person" (emphasis added). Plainly the concept of "private documents" is not inconsistent with authorship by a person other than the accused.

Taxpayers also submit that there is no requirement that information in "private papers" be previously undisclosed in order for the privilege to attach. In *Boyd v. United States, supra,* the case which originated the term "private papers," the Court extended the protection of the privilege to an invoice issued by the Union Plate Glass Company, a record of which had been entered by E. A. Boyd & Sons at the office of the Collector of Customs at the Port of New York on entry No. 47,108. 116 U.S. at 619. The invoice covered some twenty-nine, out of a total of thirty-five, cases of plate glass that had been forfeited to the Government under a statute that made it a criminal offense for any person to make false entries of imported merchandise "by means of any fraudulent or false invoice . . .". 116 U.S. at 617. Since it must have been obvious to the Court that the entry in the books of the Collector of Customs derived at least in part from information in the invoice (indeed, that was an element of the offense), and since the invoice had been issued by the Union Plate Glass Company, a company apparently based in Liverpool, England, to E. A. Boyd & Sons in New York, the fact that the contents of the invoice were created by and known to persons other than the

claimants, and the fact that information taken from the invoice had been previously disclosed to an agency of the United States Government, was not deemed inconsistent with the claim of privilege or with the term "private papers." Since the same Court which originated the term "private papers" used it to describe a paper which had the same relationship to the customs entry as a workpaper has to an income tax return, i.e., information from one paper was used to prepare the other, we see no valid basis for adopting the Government's novel theory that prior disclosure of information in a document places that document forever beyond the reach of the privilege. As the dissenting Judge noted in No. 74-18 below:

> If by "private" the majority is referring to the origin of the papers at issue, I believe its reliance on *Boyd* is misplaced. In *Boyd* the privilege was sustained with respect to business invoices prepared and *previously published by a party other than the citizen asserting the privilege* (emphasis added).

500 F.2d at 700.[9]

There is nothing in this Court's decisions subsequent to *Boyd* which would sustain the Government's prior disclosure theory. Although this Court has on occasion referred to "private" or

[9] We recognize that in *Bellis v. United States, supra,* 417 U. S. at 95, n. 2, this Court pointed out that the potential significance of the invoice in *Boyd* being a partnership record held in a representative capacity was not observed by the parties or the Court at this early stage in the development of Fifth Amendment jurisprudence. However, while the significance of the record as a partnership record might not have been apparent at that time, we hardly think it possible that the Court could have overlooked the fact that the contents of the invoice in question had previously been disclosed to persons other than the accused, if the accused's right to claim the privilege had in any way depended upon the absence of such a prior disclosure, or if the term "private papers" had been inconsistent therewith.

"personal" records in later cases, the context has never indicated that application of the privilege depended upon the degree of privacy with which records were created or maintained. Rather private records were any records that were not public or quasi-public in character. See, e.g., *Davis v. United States*, 328 U.S. 582 (1946).[10] As the Court of Appeals for the Ninth Circuit said in *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), in rejecting the very argument now made to this Court:

> Statements in *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944), that the privilege applies to "personal" or "private" records do not support the government's position. As this court pointed out in *United States v. Judson*, 322 F.2d 460, 464 (1963), the Supreme Court intended only to distinguish between records of a natural person which are entitled to Fifth Amendment protection in appropriate circumstances and records of an impersonal organization which are never entitled to such protection. Since the latter are open to inspection by the government at its pleasure, so far as the privilege against self-incrimination is concerned, they may properly be characterized as quasi-public in character. There is nothing in *White* or earlier cases to suggest that the Court intended to base Fifth Amendment consequences upon the degree of privacy which attended the creation or maintenance of particular records or upon the degree of the intimacy of the information which they contain.

388 F.2d at 471.

Couch v. United States, 409 U.S. 322 (1973), is likewise of

[10]As the Court stated in the *Davis* case:

> The coupons remained the property of the Office of Price Administration and were at all times subject to recall by it. And they were subject to inspection at all times. We are thus dealing not with *private* papers or documents but with *public* property in the custody of a citizen (emphasis in original).

328 U.S. at 588-589.

no real support to the Government. It is true that *Couch* held that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." 409 U.S. at 335. But this statement was made in response to petitioner's argument that seizure of records from her accountant, which she had previously transferred to him, interfered with the confidential nature of the accountant-client relationship and with her resulting expectation of privacy in such transfer. In finding that no reasonable expectation of privacy existed in the transfer due to the anticipated disclosures by the accountant in the tax return, all the Court was saying was that, absent a greater measure of confidentiality between the taxpayer and her accountant, possession by the accountant even of papers owned by the accused was not tantamount to or an adequate substitute for possession by the accused herself, i.e., there was not a sufficient basis for a finding of "constructive possession." The Court's language did not comprehend the situation where the papers might be returned to Mrs. Couch's actual possession or control. Nor did the Court ever suggest that the Government could have summoned the documents in question directly from Mrs. Couch (assuming she had obtained their return prior to the issuance of the summons) simply by showing that the papers had previously been in the hands of her accountant who had used them in the preparation of her tax returns. Indeed, years earlier in the *Cohen* decision, the Government had conceded that records delivered by a taxpayer to an accountant for the accountant's use in preparing the taxpayer's tax return did not become unprivileged by virtue

of their use by the accountant and subsequent return to the taxpayer. See *United States v. Cohen, supra,* 388 F.2d at 471.

This case is very different from *Couch*. In *Couch*, the Court laid great emphasis on the absence of any personal compulsion against the accused. 409 U.S. at 329. In this case, on the other hand, the Government concedes that the attorney's possession is tantamount to possession by the Taxpayers themselves (Pet. Brief at 36) and makes no contention that by directing a summons to the Taxpayers' attorney, compulsion against the Taxpayers is avoided. Rather, the Government's position is that accountant's workpapers would be unprivileged even in the hands of the Taxpayers because they were unprivileged while in the possession of the accountant. The Government argues, relying on the above-mentioned language from *Couch*, that the subsequent transfer of the papers to the Taxpayers could not reconstitute the privilege because the Taxpayers lacked any legitimate expectation of privacy in the accountant's workpapers. With deference, we think the Government underestimates the constitutional importance of Taxpayers' constructive possession of the workpapers and misapplies the expectation of privacy rationale to the facts of this case.

To begin with, this Court has never suggested that the concept of privacy should replace or supercede the concept of personal compulsion in Fifth Amendment jurisprudence. If the accused is made the object of testimonial compulsion, he is not to be denied his privilege because he has not kept his thoughts or papers sufficiently confidential. If that were true, then all the Government would have to do to deny the accused

his privilege would be to show independent evidence of a prior oral statement or documentary disclosure by the accused to a third party. This would then permit the Government to force the accused to testify or produce evidence against himself. We submit that *Couch* cannot be read as permitting privacy concepts to displace the Fifth Amendment's primary function of shielding the accused against personal compulsion.[11] And surely it was never intended to be used to *authorize* such compulsion, as the Government contends here.

Taxpayers submit that if the summons to their attorney subjected them to personal compulsion, as the Government concedes, then the privilege is available irrespective of the degree of privacy attendant upon the prior use to which the workpapers were put. Any other rule invites endless inquiry into the prior custodial history of subpoened documents in order to determine whether an otherwise valid claim of privilege

[11]As the dissenting Judge in No. 74-18 stated:

> It is true *Couch* spoke of reasonable expectations of privacy, but it did so in a *fourth amendment* context solely with reference to whether the expectations of privacy accompanying the taxpayers' *transference of records* to his accountant were such that the taxpayer *retained constructive possession*. *Couch* did not suggest that expectations of privacy were relevant to the issue of whether "books and papers" are possessed rightfully in a purely personal capacity. Moreover, *Couch's* approval of *Cohen* supports this view. Lastly, it is far less evident to me, than the majority suggests without further elaborating, that there has been a " 'shift in emphasis from property to privacy' in the [Supreme] Court's treatment of the Fifth Amendment in compelled production of documents." If anything, *Couch* represents, in my view, a shift from ownership to possession. In any event, in the absence of a fourth amendment claim, it simply is not readily apparent to me how prior Supreme Court cases justify this engrafting of privacy principles onto the fifth amendment privilege which is a protection against personal compulsion (emphasis in original).

500 F.2d at 701.

should be denied on the grounds that sufficient secrecy had not been maintained either in the accused's treatment of the documents in his possession or in the treatment afforded them by his predecessors. Under such a rule an incriminating letter, for example, could be extracted directly from the accused simply by showing that it had been out of his possession at some prior point in time.[12] Under this same approach, documents could also be denied protection for not being sufficiently "confidential" or "intimate" in nature. Each judge would then be set adrift as to his own personal notion of "confidential" papers.[13]

[12]The proposed fact situation is not fanciful. See, e.g., *Hill v. Campbell and Wife*, Law Rep. 10 C.P. 222 (1875), where the English Court of Common Pleas had before it a case in which the claimant of the privilege had written an allegedly libelous letter to a Major Horrocks which had apparently induced the Major to fire a particular person as his servant or domestic. The servant thereafter sued the letter writer and her husband for libel, but was obliged to seek production of the letter from the letter writer herself since it had been returned to her at her request prior to the institution of the lawsuit. The letter writer thereupon opposed production of the letter on the ground that it might render her liable to a criminal prosecution. Although the Court denied the claim of self-incrimination since the claimant, after being requested by the Court to state in an affidavit how the letter might incriminate her, refused to make the affidavit, the Court made it clear that the privilege would have been available if a potential for self-incrimination had existed. "Upon that point," said the Court, "there is no doubt." 10 C.P. at 238. "[The respondent] cannot by the law of England be so compelled." *Id.*

[13]See, e.g., *Hill v. Philpott*, 445 F.2d 144 (7th Cir. 1971) (Fairchild, J. dissenting):

> Assuming, however, that there is a class of papers so intimately confidential and so much a part of personhood that they ought to enjoy a superlative privacy and be protected from seizure upon an adequately grounded warrant, it does not seem to me that the records in question here have the required character. *They appear to have been maintained for business and professional purposes, with the knowledge and assistance of employees,* and the manner in which they were allegedly kept and used, made them, in a sense, instrumentalities of the tax evasion offense claimed (emphasis added) 445 F.2d at 150.

There is no support in this Court's decisions for such a radical reinterpretation of the Fifth Amendment.

But even if it is determined that an expectation of privacy in papers is an independent prerequisite to invocation of the privilege over and above the requirement of personal compulsion (a position we do not believe to be correct) and not a complementary concept relevant primarily to the issue of "constructive possession," Taxpayers nonetheless contend that the privilege is applicable in this case. It is of no small importance that at the time the summons issued Taxpayers, through their attorney, were in constructive possession of the workpapers. The dominion and control which they rightfully exercised over the workpapers, together with their pre-existing personal interest in the information contained therein, gave Taxpayers a reasonable expectation of privacy in the workpapers *at the time their attorney was served with the summons.* As this Court held in *Couch,* the "rights and obligations of the parties become fixed when the summons was served." 409 U.S. 329, n. 9. At the time the summons was served, Taxpayers had actual dominion and control over the workpapers which they had brought within "the

Footnote 13 continued:

> The suggestion that business records which are open to view by employees or others are somehow outside the coverage of the privilege is, of course, contrary to this Court's holding only last term that "the privilege applies to the business records of the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life," *Bellis v. United States,* 417 U.S. at 87-88, and to more ancient authorities such as *Ballman v. Fagin,* 200 U.S. 186 (1906). The point is that this Court has never established a hierarchy of documentary evidence from the more to the less "private" based on the confidentiality with which the documents were maintained.

private enclave where [they] lead a private life." *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1964), quoting *United States v. Grunewald*, 233 F.2d 556, 581-582 (2d Cir. 1956), *reversed*, 353 U.S. 391 (1957). That was the time to test their expectation of privacy, not, as the Government argues, when Taxpayers gave their accountant the information necessary to prepare their tax returns.

Of what relevance, we ask, is the fact that an expectation of privacy may not have existed years earlier in 1970, 1971 and 1972 when presumably the workpapers for the 1969, 1970 and 1971 tax returns were prepared? Because the prerequisites for exercising a right were not present in the past, does not constitute a very convincing reason for denying the right in the present when the necessary conditions for its exercise have come into being. In other words, the mere fact that the Government could have obtained the accountant's workpapers in this case from the accountant when the papers were in his possession without invading the private enclave of the Taxpayers and without exerting personal compulsion upon them is no justification for invading that enclave now and exerting compulsion upon the Taxpayers in contravention of the purposes of the privilege. As the Fifth Circuit stated:

> When the taxpayer in the present case received the records from his accountant, the taxpayer's physical possession became the "private enclave" which the Fifth Amendment privilege was designed to protect. It makes no difference that the taxpayer could claim no legitimate expectation of privacy when the records were held by the accountant, for it has not been suggested that a taxpayer in possession of records can be compelled to produce them because they have previously been used in preparing his own income tax return. For Fifth Amendment purposes, that the government can summon the documents from the accountant does not mean that those same documents can be summoned from the taxpayer. As the Ninth Circuit put it, "that the government might obtain these documents without compelling [the taxpayer] to incriminate himself is hardly a justification for compelling [the taxpayer] to incriminate himself (*citations omitted*).

499 F.2d at 452.

The language in *Couch* concerning the taxpayer's expectation of privacy at the time she delivered her papers to her accountant is in no sense inconsistent with the foregoing language from the decision below, for in *Couch* the taxpayer's expectation of privacy at the time she delivered her papers to the accountant were no different from what they were at the time the summons was served. No pre-summons action on her part had manifested any change in her intentions or any desire to bring those records back into the private enclave where governmental intrusion would be excluded.

Here, on the other hand, the Taxpayers had manifested such an intention prior to the issuance of legal process, but the Government would have the Court find that the Taxpayers' expectation of privacy was irrevocably fixed or frozen years earlier when the need for constitutional protection was not even apparent. We perceive the terrible effectiveness with which such a test would deny the Fifth Amendment privilege to many who would otherwise be entitled to invoke it, but we confess that the logic and legal basis for the proposition escapes us.[14]

[14]The Government's expectation of privacy argument can also be analyzed as a problem of "waiver." Under this approach, the initial transmittal of information from a taxpayer to the accountant would

We must also reject the Government's *in terrorem* argument that allowing the Taxpayers' claim of privilege in this case would ill serve the policy behind the privilege by allowing those under suspicion of having committed criminal acts to indiscriminately gather up documentary information that might be used against them.[15] There will be time enough for this Court to

Footnote 14 continued:

waive for all time the taxpayer's right to withhold from the Government any documents embodying such information. However, the argument clearly fails to meet established standards for the waiver of constitutional rights. Any waiver of the privilege against self-incrimination must be a "knowing and intelligent" waiver. See *Miranda v. State of Arizona*, 384 U.S. 436, 475 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gardner v. Broderick*, 392 U.S. 273 (1968). To hold that the giving of information to an accountant waives the privilege with respect to such information even though the need to claim the privilege may be years in the future is clearly contrary to the concept of a "knowing and intelligent" waiver. But even if the transfer of information to an accountant could, by some alchemy, constitute a waiver of the privilege, then by the smae logic the subsequent acquisition of documents embodying that information ought to operate as an effective withdrawal of the waiver as to those documents. Cf. *Stevens v. Marks*, 383 U.S. 234, 243-144 (1966); *U.S. v. DeCastro, West & Chodorow, Inc.*, 75-2 CCH Fed. Tax. Rptr. ¶9535 (6th Cir. 1975), since the Government cannot have relied on the waiver to its detriment.

[15] As the Government states:

> It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris*, 221 U.S. 274, 279-280, "[t]he right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

Pet. Brief at 26. We would point out that the Government's reliance on dicta from *Matter of Harris*, 221 U.S. 274 (1911) is misplaced. *Matter of Harris, supra*, was a case in which an involuntary bankrupt was required to turn over his records to a receiver, despite a claim of self-incrimination. However, as this Court explained in *McCarthy v.*

consider the applicability of the Fifth Amendment to such a situation when an accused seeks to use his privilege to protect information with which he lacks any prior personal interest or connection. But that situation is not present in this case. These workpapers are not impersonal records unrelated to these Taxpayers. In fact, except for the element of ownership, this case presents the situation that would have been presented in *Couch* had Mrs. Couch obtained the return of her papers from her accountant prior to the issuance of process and the Government had been obliged to serve her or her attorney instead. We do not believe that in such circumstances the Government would have defeated her claim of privilege. Nor do we think the absence of ownership in this case should dictate a different result. These workpapers may not be the Taxpayers' "private papers" in a proprietary sense, but they are "private papers" in every other relevant respect and have none of the characteristics of "public papers." As the Ninth Circuit stated almost a decade ago in rejecting this very argument by the Government:

> But even if we were to accept the government's test,

Footnote 15 continued:

Arndstein, 266 U.S. 34, 41 (1924), *Matter of Harris* rests on the proposition that the privilege against self-incrimination relates to the "adjective law," i.e., to evidence and witnesses, and therefore the privilege does not prevent the true owner of property from obtaining its return. Since the bankruptcy petition in *Matter of Harris* operated to vest the receiver with title to the papers in question, the privilege, which is testimonial in nature, was not allowed to defeat the receiver's superior right of ownership. In this case, on the other hand, the Government's claim to the papers rests not on any claim to superior title, but solely on the adjectival claim to view the records for their evidentiary and testimonial content. *Matter of Harris* is, therefore, wholly inapplicable to this case. See *McCarthy v. Arndstein, supra*, 266 U.S. at 41.

> the claim of privilege would not be barred here. Though prepared by Berke . . . the work papers were scarcely public documents. They embody countless items of information relating to Cohen's purely personal affairs, including itemizations and summaries of data prepared directly from Cohen's bank statements, cancelled checks, and similar records. They were plainly intended for no eyes but those Cohen might designate. To pretend that such papers did not in substance reflect matter personal and private to Cohen, and to treat such papers as a source of information "independent" of Cohen, would be to condone the very 'shifts and subterfuges' which the government calls upon us to condemn.

388 F.2d at 472.

For the reasons stated, the accountant's workpapers in this case should be held susceptible to a claim of privilege in the hands of the Taxpayers or their attorney.

IV.

THE TAXPAYERS' FIFTH AMENDMENT PRIVILEGE IN THE ACCOUNTANT'S WORKPAPERS WAS NOT LOST BY TRANSFERRING THE WORKPAPERS TO TAXPAYERS' ATTORNEY.

The Government's position in the Court of Appeals was that the transfer of the workpapers from the Taxpayers to their attorney precluded findings that: (1) the Taxpayers remained in "constructive possession" of the workpapers; (2) the Taxpayers had a legitimate expectation of privacy in workpapers in the hands of their attorney; and (3) "personal compulsion" was being exerted upon them (Government's Brief for the Appellees at 22-26). Before this Court, however, the Government has changed its position and no longer so contends. The Government now says:

> We agree with the Court below in No. 74-611 that the transfer of the accountant's workpapers to the attorney should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession.

Pet. Brief at 36. See also Pet. Brief at 36, n. 16. As in *Curcio v. United States*, 354 U.S. 118, 121 (1957), "there is substantial ground for the Government's concession."

In *Couch v. United States*, 409 U.S. 322 (1973), this Court acknowledged that actual possession of documents is *not* an essential prerequisite to assertion of the privilege against self-incrimination. As this Court stated:

> . . . situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

409 U.S. at 333.

Although this Court denied the privilege to the taxpayer in *Couch*, whose documents were in the hands of her accountant when the subpoena issued, this Court's acknowledgement that constructive possession was a viable approach to Fifth Amendment rights, 409 U.S. at 333, and this Court's reasons for denying the privilege to Mrs. Couch, both strongly indicate that possession by a taxpayer's attorney, rather than his accountant, would be deemed sufficient constructive possession by the taxpayer to warrant assertion of the privilege.

The crux of this Court's decision in *Couch* was its holding that there was "no legitimate expectation of privacy and no semblance of governmental compulsion against the person of

the accused," 409 U.S. at 336, in obtaining records from her accountant. In reaching that conclusion, this Court noted that no confidential accountant-client privilege exists under federal law and further observed that no legitimate expectation of privacy exists in the accountant-client relationship because the accountant in his preparation of tax returns is under statutory duties of full disclosure to the Government and may disclose or not disclose the contents of the documents in question in his sole discretion. 409 U.S. at 335.

The relationship between an attorney and his client is obviously very different and there is clearly every expectation of privacy in that relationship. An attorney-client privilege *is* recognized by federal cases, *United States v. Judson*, 322 F.2d 460, 462-463 (9th Cir. 1963); *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961), and the attorney *is* under ethical as well as legal compulsions not to disclose his client's private affairs. (See Texas Code of Criminal Procedure, §38.10, and ABA Code of Professional Responsibility, EC4-4). Moreover, when an attorney receives papers after an investigation for criminal violations of the tax laws has begun, he stands in as adversarial a posture to the government as the client himself and, unlike the accountant who is merely preparing a tax return, the attorney owes the government no duty of disclosure. In short, it may be fairly stated that there probably exists in the law no relationship which has more legal protection from outside intrusion than the attorney-client relationship and which therefore commands as great an expectation of privacy. To deny the taxpayer his privilege against self-incrimination because he places his records in the custody of an attorney retained to defend him in the very matter under investigation would clearly do violence to the realities of that relationship. As Mr. Justice Marshall stated in *Couch* (dissenting opinion):

> A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, *but also because the ordinary expectation is that the lawyer will not further publicize what he has been given.*

409 U.S. at 350 (emphasis added). Accord, *United States v. Kasmir, supra*, 499 F.2d at 453. Cf. *United States v. Judson, supra*, 322 F.2d at 467.

The legitimate expectation of privacy that exists in the attorney-client relationship is not the only reason for distinguishing between an accountant and an attorney in ascertaining the scope of the privilege against self-incrimination. The transfer of records from the accused to his attorney when it occurs "in the course of an attorney-client relationship, *People v. Minkowitz*, 220 N.Y. 399, 115 N.E. 987 (1917), discussed in *Remmer v. United States*, 205 F.2d 277, 285 (9th Cir. 1953), *reversed on other grounds*, 347 U.S. 827 (1954), is generally a transfer made in order to secure the informed advice of counsel on whether or not the accused should claim his privilege. See *United States v. Judson*, 322 F.2d 406 (9th Cir. 1963). As the Court stated in *Judson:*

> The very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their clients' financial affairs.

322 F.2d at 468.

The transfer of records to an attorney during the course of

his representation of a client is therefore a necessary adjunct of the privilege itself. Unless such a transfer can be made without penalty or price, the privilege may be lost. As this Court recently stated:

> The assertion of a testimonial privilege, as of many other rights, often depends upon legal advice from someone who is trained and skilled in the subject matter, and who may offer a more objective opinion. A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion.

Maness v. Meyers, 43 U.S.L.W. 4143, 4149 (January 15, 1975). See also *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). In order to avoid depriving an accused of the advice of counsel or unconstitutionally penalizing him for seeking legal advice,[16] the transfer of records to an attorney during the course of an attorney-client relationship must be free of any harmful consequences to the privilege. Otherwise, the opportunities to intelligently exercise the privilege will be greatly impaired and the accused will be put to an unconstitutional Hobson's choice between an administratively conferred right to consult with counsel on the one hand[17] and his constitutional right not to

[16]The concept of a "penalty" in connection with the exercise of the privilege has been defined as "the imposition of any sanction which makes assertion of the Fifth Amendment costly." *Spevak v. Klein*, 385 U.S. 511 (1967).

[17]See IRS News Release IR-949 (1969), CCH Fed. Tax Rptr. ¶6946; *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969). Cf. *Backer v. C.I.R.*, 275 F.2d 141, 144 (5th Cir. 1960).

incriminate himself on the other. To force the accused to make such a choice is constitutionally impermissible.[18]

Finally, unlike the issuance of process to an accountant, it cannot be said that a transfer of records from a taxpayer to his attorney, followed by the attorney's compelled production of the records, produces "no semblance of Governmental compulsion against the person of the accused." *Couch v. United States, supra*, 409 U.S. at 336. The relationship between the accused and the attorney retained to defend him in the matter under investigation is necessarily a unique one. For all important purposes, they act with respect to the Government as a single person. As the Ninth Circuit noted in quashing a subpoena directed to a taxpayer's attorney:

> The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. *But this argument ignores the realities of the relationship existing where B is A's attorney.* An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. *No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney.* He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. *The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry. United States v. Judson, supra*, 322 F.2d at 467 (emphasis added).

[18]*Gardner v. Broderick*, 392 U.S. 273, 277 (1968); *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280, 284 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967); Cf. *Stevens v. Marks*, 383 U.S. 234, 243 (1966); *Frost Trucking Co. v. Railroad Comm'n. of State of California*, 271 U.S. 583, 593 (1926).

Permitting the Government to disrupt this identity of interest between attorney and client by making the transfer of records to the attorney the occasion for the loss of the privilege and not its preservation, does not free the accused from all governmental compulsion. Quite the contrary. By forcing an accused to surrender his right to consult with counsel, or else to consult with counsel only under the most adverse conditions where the records can never leave the physical possession of the client, the privilege holder's ability to effectively exercise his privilege is reduced and the governmental compulsion upon him is correspondingly increased. The compulsion is therefore not removed, but simply allowed to take a more subtle form. As the Ninth Circuit has stated in *United States v. Judson,* 322 F.2d 460, (9th Cir. 1963).

> If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer was not available to utter the magic words. In our judgment, the inherent power thus to *compel indirectly* an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power *to compel the same result directly.*

322 F.2d at 468 (emphasis added).

For the reasons stated, the Government's concession that the Taxpayers' rights should neither be enlarged nor decreased by the transfer to their attorney should be accepted, and their attorney's possession of the workpapers should be deemed sufficient constructive possession by the Taxpayers themselves to

permit invocation of their Fifth Amendment privilege.[19] Accord, *United States v. Judson, supra; Colton v. United States,* 306 F.2d 633, 639 (2d Cir. 1962), *cert. den.,* 371 U.S. 951 (1963); *United States v. Riland,* 364 F.Supp. 120, 122 (S.D.N.Y. 1973); *Hughes v. Foster, Lewis, Langley & Onion,* 65-1 U.S.T.C. ¶9418 (W.D. Tex. 1964) *govt's appeal dismissed,* December 16, 1965; *Application of House,* 144 F.Supp. 95 (N.D. Cal. 1956); *People v. Minkowitz,* 220 N.Y. 399, 115 N.E. 987 (1917); 8 Wigmore *Evidence,* (McNaughton Rev. 1961), §2307, pp. 593-595.

V.

THE ACCOUNTANT'S WORKPAPERS ARE TESTIMONIAL IN NATURE AND THEIR COMPELLED PRODUCTION WOULD INCRIMINATE THE TAXPAYERS

The Government argues that the production of the accountant's workpapers would not require the Taxpayers to make any self-incriminating disclosures of a testimonial or communicative nature relying on this Court's decision in *Schmerber v. California,* 384 U.S. 757 (1966) (Pet. Brief at 16, 34-35). In *Schmerber,* this Court was faced with the issue of whether the with-

[19]It should be noted that Taxpayers have never argued that their Fifth Amendment rights were created or enlarged by the transfer to their attorney, as the Government persists in suggesting (Pet. Brief at 38). Nor does the Government fairly characterize the Fifth Circuit's decision in this respect (Pet. Brief at 37-39). All Taxpayers have contended, and all the Fifth Circuit found, was that the unique characteristics of the attorney-client relationship, as described above, lend support to Taxpayers' position that they had a legitimate expectation of privacy in records which they had placed into the hands of their attorney, that the issuance of the summons to their attorney amounted to "personal compulsion" upon them, and that they remained in "constructive possession" of the transferred records even when such records were in the custody of counsel.

drawal of blood and admission in evidence of an analysis thereon violated the defendant's privilege against self-incrimination. In holding the analysis admissible, this Court established the principle that the privilege protects an accused from being compelled to provide evidence of a "testimonial or communicative" nature and that the withdrawal of blood and use of the analysis did not involve compulsion to these ends. 384 U.S. at 761.

Unlike the situation in *Schmerber*, the Government here is not seeking the accountant's workpapers in order to determine the physical properties of the paper, the ink or the accountant's handwriting. It is obvious that the Government has no interest in the *physical* qualities of the workpapers nor in obtaining *physical* evidence from them. Instead, the Government is seeking the accountant's workpapers for the *information* contained therein concerning the Taxpayers. Since the workpapers are clearly testimonial in character, this case is distinguishable on that ground not only from the *Schmerber* case, but also from *Warden v. Hayden*, 387 U.S. 294 (1967) (clothing), *United States v. Dionisio*, 410 U.S. 1 (1973) (voice exemplars), and *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplars).

The Government also argues that production of the workpapers in this case would not incriminate the Taxpayers because "In complying with the summons, the Taxpayers would not be authenticating the workpapers or testifying about them in any manner" (Pet. Brief at 34). The Government cites *United States v. White, supra*, 322 U.S. at 698, for the proposition

that the privilege "is designed to prevent the use of the legal process to force from the lips of the accused individual the evidence necessary to convict him or *to force him to produce and authenticate any personal documents or effects that might incriminate him*" (emphasis added by Government). The Government contends that since only the accountant can authenticate the workpapers, Taxpayer's production of the records would not be incriminating. Such production, it argues, would only be an admission by the Taxpayers that the workpapers were in their possession, a fact that is said to be already admitted and, in any event, not to be incriminating (Pet. Brief at 35).

The Government's argument must be rejected since it improperly limits the scope of the privilege to those situations where the act of production is itself testimonial. Taxpayers recognize that the protection afforded by the Fifth Amendment includes protection against the compelled production of books and records *in part* on the theory that the act of production "is itself a representation that the documents produced are those demanded by the subpoena" *Curcio v. United States*, 354 U.S. 118, 125 (1957). But this Court has never held that the testimonial character of the act of production is the *sole* rationale for applying the privilege to documentary evidence.

There is nothing in the Government's quotation from the *White* decision which establishes any such limitation. In fact, the quotation from *White* must be read in light of the Court's statement only a few sentences later that the privilege ". . . protects the individual from *any disclosure*, in the form of oral

testimony, documents or chattels, sought by legal process against him as a witness" 322 U.S. at 699 (emphasis added). Furthermore, there are other indications in decisions by this Court that application of the privilege to documents is not limited solely to those situations where the act of production will be incriminating.

In *Gouled v. United States*, 255 U.S. 298 (1921), for example, the Court had under consideration a case in which a search of the defendant's office had been made, followed by the seizure of his private papers. Since the authorities seized the papers in issue, no testimonial act of production by the accused was involved. Nonetheless, in holding the Fifth Amendment to have been violated, the Court stated:

> In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case *he is the unwilling source of the evidence*, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case.

255 U.S. at 306 (emphasis added). See also, ***Hill v. Philpott***, 445 F.2d 144 (7th Cir. 1971), *cert. den.*, 404 U.S. 991 (1971), cited in *Couch v. United States*, 409 U.S. 322, 330 (1973). But Cf. *United States v. Blank*, 459 F.2d 383 (6th Cir. 1972). Also see *United States v. Dionisio*, 410 U.S. 1, 7, n. 6 (1973), where this Court said: "But *Boyd* dealt with the compulsory production of private books and records, *testimonial sources*, a circumstance in which the 'Fourth and Fifth Amendments run almost into each other' 116 U.S. at 630, 6 S.Ct., at 532."

More recently, this Court has illustrated the inadequacy of

the theory that the Fifth Amendment protects documentary evidence *only* if the accused himself produces the records by recognizing the constitutional viability of "constructive possession." *Couch v. United States*, 409 U.S. 322 (1973). In *Couch*, petitioner had argued that "[i]f the IRS is able to reach her records the instant those records leave her hands and are deposited in the hands of her retainer whom she has hired for a special purpose then the meaning of the privilege is lost" 409 U.S. at 333. If the Fifth Amendment privilege gave no protection to records apart from the act of production, as argued by the Government, then the Court in *Couch* could simply have responded that petitioner's fears were well-founded because, in the absence of physical possession, she was in no danger of making any testimonial disclosure that contravened the policies of the privilege. Instead, this Court stated:

> That is not, however, the import of today's decision. We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

409 U.S. at 333.

This concept of constructive possession necessarily recognizes the applicability of the Fifth Amendment to documentary evidence even where no act of production by the accused himself is required. Cf. *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), *cert den.*, 352 U.S. 833 (1956). Indeed, Mr. Justice Brennan, concurring in the *Couch* case, made

explicit what was necessarily implicit in the majority's opinion concerning the scope of the privilege:

> In some of these instances, to be sure, the person claiming the privilege would not himself have been the subject of direct Government compulsion. And there is no doubt that the Fifth Amendment is concerned solely with compulsory self-incrimination. But surely the availability of the Fifth Amendment privilege cannot depend on whether or not the owner of the documents is compelled personally to turn the documents over to the Government. *If private, testimonial documents held in the owner's own possession are privileged under the Fifth Amendment, then the Government cannot nullify that privilege by finding a way to obtain the documents without requiring the owner to take them in hand and personally present them to the Government agents.* Where the Government takes private records from, for example, a safety deposit box against the will of the owner of the documents, the owner has been compelled, in my view, to incriminate himself within the meaning of the Fifth Amendment.

409 U.S. at 337, n * (emphasis added). *Couch* would therefore seem to support the theory that the accused cannot be made the unwilling "source" of testimonial documents held under his control and dominion with a legitimate expectation of privacy, even if some way can be found to obtain the documents without requiring their production by the accused himself. However, this does not appear to be the only rationale for sustaining application of the privilege in such circumstances. Since *Schmerber v. California,* 384 U.S. 757 (1966), a somewhat different and parallel approach to the coverage of the Fifth Amendment has begun to develop.

In *Schmerber,* the accused was totally passive, so no issue involving the communicative aspects of the act of producing

documents was at stake. Nonetheless, rather than emphasizing the role of the accused as the "source" of incriminating evidence, the Court focused on whether the communications in question were directly or indirectly the accused's own communications, irrespective of the form they might take, and whether they *related* to some communicative act or writing by the accused. Thus the Court stated in *Schmerber:*

> It is clear that the protection of the privilege reaches an accused's communications, *whatever form they might take,* and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

384 U.S. at 763-764 (emphasis added). Later in the same opinion, the Court observed:

> Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony *nor evidence relating to some communicative act or writing by the petitioner,* it was not inadmissible on privilege grounds.

384 U.S. at 765 (emphasis added).

The theory that a writing may be within the protection of the privilege if it relates to some communicative act or statement by the accused received its most recent articulation in this Court's opinion in *United States v. Nobles,* 43 U.S.L.W. 4815, 4818 (June 23, 1975). In that case, the Government sought production of a defense investigator's interviews with third parties. When the defendant refused to produce the report as requested by the prosecution, the trial court refused to permit the investigator to testify. On appeal, the circuit court held that the lower court's ruling had infringed on the defendant's

Fifth Amendment privilege since he had a right not to produce the report and could not therefore be penalized for his refusal. In reversing the decision of the Court of Appeals insofar as it pertained to the Fifth Amendment ruling, this Court stated:

> Respondent did not prepare the report, and *there is no suggestion that the portions subject to the disclosure order reflected any information that he conveyed to the investigator*. The fact that these statements of third parties were elicited by a defense investigator on respondent's behalf does not convert them into respondent's personal communications. Requiring their production from the investigator therefore would not in any sense compel respondent to be a witness against himself or extort communication from him.

43 U.S.L.W. at 4818 (emphasis added).

The foregoing cases indicate that at least two rationales for application of the Fifth Amendment to documentary evidence have developed in this Court's decisions in addition to the production theory suggested by the Government. The first and broader theory would protect all documentary evidence when sought for its testimonial content, irrespective of whether the accused physically produced it, so long as the accused was the "source" of such evidence in the sense that he had dominion and control over it at the time of its compelled disclosure. The second and narrower theory would look to the nature of the writings to see if they reflected or in any way related to prior communicative acts of the accused. If they did, their compelled disclosure would be forbidden. Presumably, however, if they did not relate to communications of the accused, but to information emanating from third parties, they would have to be produced.

Taxpayers contend that under either theory the workpapers in this case are constitutionally protected. Taxpayers were certainly the "source" of the documents in issue at the time the summons was served in the sense that Taxpayers had dominion and control over the workpapers while the papers were in the possession of their attorney, and their forced production would therefore compel Taxpayers to produce testimonial evidence against themselves. Taxpayers are also protected by the second theory since the workpapers relate to prior communicative acts of the Taxpayers, being based *entirely* on information which they gave to the accountant. The compelled disclosure of those prior communications at the present time would surely be as incriminating and testimonial in nature as testimony directly from the witness stand. In fact, the evidentiary significance of the workpapers lies in the fact that they are based on communications from the Taxpayers to the accountant. That is what gives them their evidentiary force and that is exactly why they should be constitutionally protected.

The Fifth Amendment looks at substance and not form. Its protection "is as broad as the mischief against which it seeks to guard," *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892), and it protects *all* communications by the accused "whatever form they might take." *Schmerber v. United States, supra*, 384 U.S. at 765.

Taxpayers submit that without ever reaching the broader theory of whether all documentary evidence in the possession of or under the control or dominion of the accused can be summoned, the Court can and should rule that accountant's

workpapers are protected by the Fifth Amendment in the hands of the Taxpayers who furnished the accountant with the information in them. Such workpapers are in substance the prior communications of the Taxpayers, despite their present form. If their production is compelled now, such production extorts communications from them no less than present oral testimony It constitutes "inquisitional pressure or coercion against a potentially accused person, compelling [him] against [his] will to utter incriminating self-condemning words or produce incriminating documents . . ." *Couch v. United States, supra,* 409 U.S. at 329.

Surely the fact that the utterances contained in the workpapers were made in writing at a prior time is no excuse for requiring an accused to republish them now. If an accused writes on a piece of paper, "I killed Ivy Printer," and if during the investigation of the death of Ivy Printer the note is removed from the constructive possession of the accused without requiring any act of production or authentication on his part, could it justly be said that such confession was not "testimonial" in nature and was outside the protection of the privilege? We think not. See *State v. Kirchess,* 269 So.2d 16 (Fla. Ct. of App.). Nor do we think any different result should obtain because the testimonial items are communicated to a third person who writes them down. See *Wilson v. United States, supra.*

The workpapers in this case are based entirely on information communicated to the accountant by the Taxpayers. As such, they are testimonial communications of the Taxpayers

reduced to writing by another at a prior time, but which are now within the dominion and control of the Taxpayers. Requiring their republication at this time is therefore to exact a testimonial communication from the Taxpayers themselves in violation of their privilege.[20]

Finally, we note that even under the Government's own theory that production is itself a communicative act, production of the papers should be barred. Taxpayers' attorney holds the papers in this case for and on behalf of the Taxpayers. His production of the papers should therefore be deemed the testimonial act of his clients and protected by the privilege. Any other result will render the concept of constructive possession meaningless and will undo the Government's valid concession in this case that the transfer to the attorney "should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession" (Pet. Brief at 36). Obviously, when the workpapers were in the Taxpayers' physical possession prior to the transfer to the attorney, their act of production would have constituted a testimonial communication. Holding that the transfer to the attorney changes the result will adversely effect the attorney-client relationship as previously discussed.

For the reasons stated, the Government's argument that the compelled production of workpapers from the accused's attorney is not "testimonial" in nature must be rejected.

[20]The fact that the accountant may be able to authenticate the workpapers at subsequent legal proceedings does not, of course, justify the use of legal process to obtain them if their contents would incriminate the accused. The Fifth Amendment protects against the incriminating disclosure itself and not just its admissibility into evidence. *Maness v. Meyers,* 43 U.S.L.W. 4143, 4147 (Jan. 15, 1975).

VI.

TAXPAYERS' ATTORNEY HAS STANDING TO RAISE TAXPAYERS' CONSTITUTIONAL RIGHTS

The Government takes the position in its Brief that the Taxpayers' attorney may not invoke the privilege on behalf of his clients (Pet. Brief at 40). While this issue was not raised in the District Court until after the close of all evidence (A. 69), and the District Court made no finding in that respect (A. 77-78), the Fifth Circuit nonetheless considered the issue on appeal and rejected the Government's position. It held that "the weight of authority and reason supports the position that an attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege" *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

The majority rule among the Circuits is that an attorney *does* have standing to raise a claim of self-incrimination on his clients' behalf when the attorney is served with summons, if his clients could themselves assert the privilege. *United States v. Judson*, 322 F.2d 460, 463-465 (9th Cir. 1963); *Colton v. United States*, 306 F.2d 633, 639 (2d Cir. 1962), *cert. den.*, 371 U.S. 951 (1963); *Brody v. United States*, 243 F.2d 378, 387, n. 5 (1st Cir. 1957), *cert. den.*, 354 U.S. 923 (1957).[21]

[21]See also, *Hughes v. Foster, Lewis, Langley & Onion*, 65-1 U.S.T.C. ¶9418 (W.D. Tex. 1964), *govt's appeal dismissed*, December 16, 1965; *Application of House*, 144 F.Supp. 95 (N.D. Calif. 1956); *People v. Meyers*, 35 Ill. 2d 311, 220 N.E. 2d 297 (1966); *Clifton v. Granger*, 53 N.W. 316 (Iowa 1892); 8 Wigmore, *Evidence*, §2270, p. 416 (McNaughton Rev. 1961); Contra, *United States v. Boccuto*, 175 F.Supp. 886 (D. N.Y. 1959), *appeal dismissed*, 274 F.2d 860.

But Cf. *Bouschor v. United States*, 316 F.2d 451, 458-459 (8th Cir. 1963); *In re Fahey*, 300 F.2d 383 (6th Cir. 1961); and *United States v. Goldfarb*, 328 F.2d 280, 282 (6th Cir. 1964), *cert. den.*, 377 U.S. 976 (1964).[22] In summary, the First, Second and Ninth Circuits all permit the attorney to assert his client's privilege in circumstances where the client himself could have asserted the privilege, while the Eighth and Sixth Circuits have taken a contrary position.

An initial question arises as to the soundness of the authorities supporting the Eighth and Sixth Circuits' position on standing. While the majority opinion in the Fifth Circuit's decision in *United States v. White*, 477 F.2d 757 (5th Cir. 1973), *aff'd. per curiam en banc*, 487 F.2d 1335, *cert. den.*, 419 U.S. 872 (1974), did not reach the question, Judge Ainsworth in his dissent noted, at footnote 4, that the Supreme Court cases relied on in *Bouschor v. United States, supra*, and *In re Fahey, supra*, did not really support the proposition that an attorney could not assert his client's Fifth Amendment privilege. In this regard, Judge Ainsworth observed that *Bouschor* and *Fahey:*

> "rely on dicta from Supreme Court cases where a mere agency relationship existed for the benefit of a public entity which had no Fifth Amendment privilege, such as in Rogers v. United States, 340 U.S. 367, 71 S.Ct. 438 (1951); United States v. White, 322 U.S. 694, 64 S.Ct. 1248 (1944); McAlister v. Henkel, 201 U.S. 90, 26 S.Ct.

[22]The Government also cites *Ziegler v. United States*, 174 F.2d 439, 447 (9th Cir 1949), *cert. den.*, 338 U.S. 822 (1949) (Pet. B rief at 41, n. 21), but that decision would seem to be overruled on this point by the Ninth Circuit's later decision in *Judson v. United States, supra.*

385 (1966); and Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370 (1906)."

477 F.2d at 766, n. 4.

The rationale of *Bouschor* and *Fahey* may also be questioned on the grounds that an attorney unlike other agents is capable of appearing on behalf of his client in legal proceedings and that, in effect, the attorney's appearance and his assertion of the privilege is tantamount to the client's appearance and assertion of the privilege. This is clearly the law with respect to assertion of the attorney-client privilege, *Ex Parte Lipscomb*, 239 S.W. 1101 (Tex. Sp. Ct. 1922), 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961), and Respondents have discovered no sound reason for distinguishing between the attorney-client privilege and the privilege against self-incrimination with respect to the attorney's standing to assert them on behalf of his client.

It is well established that the attorney-client privilege is also a "personal privilege" belonging to the client and not to the attorney.[23] The attorney, however, can assert the privilege on behalf of the client even when the client is not a party to the action in which the privilege arises. Furthermore, the attorney has the *duty* to assert the privilege for his client whenever it may be applicable. *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir. 1956), *cert. den.*, 352 U.S. 833 (1956). As said by the Texas Supreme Court in *Ex Parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922):

> Where the attorney objects to testifying upon the ground of privilege, it is to be regarded as the objection of the client.

[23] *Ex Parte Lipscomb*, 239 S.W. 1101, 1103 (Tex. Sp. Ct. 1922); 8 Wigmore, *Evidence*, §2321 (McNaughton Rev. 1961).

Examination of the policy behind the liberalized rule of standing applicable to the attorney-client privilege strongly supports the positions of the First, Second and Ninth Circuits in also allowing an attorney to raise his client's privilege against self-incrimination with respect to records placed in the attorney's possession. The purpose behind the attorney-client privilege has been stated to be as follows:

> In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. 8 Wigmore, *Evidence*, §2291 (McNaughton Rev. 1961).

A standing rule which requires a client to be on call at all times to personally claim his attorney-client privilege would tend to inhibit freedom of consultation between an attorney and his client because of the ever present risk that an attorney could be called to testify about conversations with his client at a time when the client might not be available to personally attend and invoke his privilege.[24] This risk, the full scope of which can never be ascertained in advance, would necessarily inhibit the free flow of information between an attorney and his client.

The same policy considerations are equally applicable to the

[24] As the Court stated in *Judson:*

> If the government's position were sustained here . . . [T]he government's powers could then be utilized to compel disclosure . . . by the attorney *whenever the taxpayer were not available to utter the magic words* 322 F.2d at 468 (emphasis added).

assertion of the Fifth Amendment privilege where possession of records by an attorney is the necessary result of attorney-client consultations. In either case, a rule of standing which requires the client to personally assert his privilege will have an inhibiting effect on the ability of the attorney to consult freely with his client. Examination of books and records, particularly in an investigation of a criminal violation of the tax laws, is essential to effective legal representation. As the Court said in *United States v. Judson, supra:*

> The very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their clients' financial affairs *Judson, supra,* at 468.

If the *Bouschor* and *Fahey* rule of standing is adopted, prudent attorneys, knowing that they will not be able to be assured of the availability of their clients at some future date when they may be served with summons, will be forced to advise their clients to keep the tax records in their own possession at all times, and both attorney and client will be subjected to a significant inhibition in their freedom of consultation. This inhibition on the right to consult with counsel which has not been found justified in connection with the attorney-client privilege is equally unjustified as applied to the privilege against self-incrimination.[25]

The *Bouschor and Fahey* rule is also unnecessarily wasteful.

[25]Permitting an attorney to assert his client's rights, where not to do so could inhibit the attorney-client relationship, would not be to promulgate any unusual rule of law. It is not at all uncommon for relaxed rules of standing to be adopted where substantive rights would otherwise be adversely affected. See, e.g., *Simmons v. United States,* 390 U.S. 377, 390-394 (1968).

This is indicated by the fact that an adverse ruling on the standing issue in no way precludes the Taxpayers from raising their privilege in any criminal proceeding that may eventually be brought against them. *Donaldson v. United States,* 400 U.S. 517, 531 (1971); *United States v. Newman,* 441 F.2d 165, 174 (5th Cir. 1971). Thus, if adjudication on the claim of privilege is deferred,not for the sound reason that no protectable interest exists, compare *United States v. Newman, supra* (intervention denied), with *Stuart v. United States,* 416 F.2d 459, 463 (5th Cir. 1969) (intervention granted), but on the wholly artificial ground that an attorney has no standing to assert his client's claim of self-incrimination, then the Government will have succeeded only in postponing until trial the day of reckoning when the privilege *can* be asserted. Such a postponement is unnecessarily costly to all concerned, for if the claim of privilege is valid now, it will be valid then and postponing the day for determination of that issue only means that the Government's intervening investigation and expenditure of public funds is likely to be wasted since any evidence the Government gathers resulting from the enforcement of the summons will probably be suppressed at trial as fruit of the poison tree. *Murphy v. Waterfront Commission of New York Harbor,* 378 U.S. 52, 79 (1964); *Wong Sun v. United States,* 371 U.S. 471 (1963).[26] Moreover, the Taxpayers will have been subjected

[26]This is not, of course, to say that a motion to suppress at trial is an adequate substitute for the nondisclosure of the records at the outset and the quashing of the summons. It clearly is not. Where incriminating documents have not yet been produced " 'the cat' [is] not yet 'out of the bag' and reliance upon a later objection or motion to suppress would 'let the cat out' with no assurance whatever of putting it back." *Maness v. Meyers,* 43 U.S.L.W. 4143, 4148 (Jan. 15, 1975). Once the Government has the records, it can use them to develop evidence and

to a criminal investigation in the interim which the Government might otherwise have called off. So wasteful a procedure, grounded as it is in purely formalistic reasons, should not be condoned.

A rule of standing which denies the attorney the right to invoke his client's privilege to protect the client would also seem to be at odds with the principle that an attorney is his client's spokesman in court, for good or ill, and his statements, if made within the scope of his authority, are binding on the client. *Laird v. Air Carrier Engine Service,* 263 F.2d 948 (5th Cir. 1959). As the Fifth Circuit stated in the *Laird* case:

> An attorney has wide authority in the conduct of litigation. He is chosen to speak for the client in Court. When he speaks in Court, whether it be on a formal trial or in an informal pre-trial, he speaks for and as the client. Those statements or agreements which dispense with proof of facts are made with respect to the impending trial and until withdrawn are not merely evidence as in the case

Footnote 26 continued:

follow leads in innumerable ways too subtle to trace and so long as the Government is careful to also develop some plausible "independent source" for the evidence it actually introduces at trial, it can profit from its improper acts. The taxpayer can easily lose in his subsequent efforts to show that the evidence used against him had an illegal source. See, *Balistrieri v. United States,* 394 U.S. 985 (1969). While the suppression procedure is therefore entirely proper where no legal mechanism exists for stopping the disclosures in advance (e.g., where there are covert bugging activities or warrantless arrests) and suppression is the best remedy available under the circumstances, the availability of such a procedure at trial is no excuse for lending the Government the aid of the judiciary to enforce an unconstitutional disclosure in circumstances where the Courts have it within their power to prevent the abuse at the threshold.

> of an ordinary admission. They are absolutely binding. As long as they stand, they foreclose the matter altogether.

263 F.2d at 953.

The record in this case clearly establishes that Attorney Kasmir was acting within the scope of his authority. The Taxpayers executed an Internal Revenue Service form Power of Attorney to Attorney Kasmir (A. 87-88). In the verified Response to Order to Show Cause and Motion to Quash Summons, filed in the District Court, Attorney Kasmir stated that he had "been directed by his clients, the Taxpayers, to assert their rights and privileges under the Fifth Amendment to the Constitution of the United States" (A. 18). In sworn testimony before the District Court, Attorney Kasmir testified that he had been instructed by the Taxpayers to "assert any rights that he [the Taxpayers] might have to protect them" (A. 65). Furthermore, the Government has never challenged either the authority of Attorney Kasmir to represent the Taxpayers or the scope of his representation.

Under the circumstances, Attorney Kasmir should be allowed to assert his clients' constitutional privilege. Where an attorney's authority is such that his clients will be visited with any adverse consequences of his conduct or statements, it is contrary to fundamental principles of fairness to hold that they are not also entitled to enjoy the beneficial effects of that advocacy.

The rule that an attorney cannot assert his client's Fifth Amendment privilege should also be rejected because it is grounded in a matter of procedural convenience within the

complete control of the Government and elevates form over substance. It is a well accepted practice in the federal courts to send a summons, a subpoena or a motion to produce to the party himself, even though in fact the documents in question may be in the actual possession of his attorney.[27] The physical location of the documents is unimportant. Basically, the test is control.[28] So long as the attorney is subject to the direction and control of his client, the attorney must produce records in his possesion when the client is subpoenaed.[29] If the Government had served its summons upon the Taxpayers in this case once it learned that the papers it sought were in the possession of the Taxpayers' attorney, no issue of standing would now exist. In view of the Government's representations to this Court in the *Couch* case that in situations where the taxpayer "retains possession and control of the records, it ordinarily issues the summons to the taxpayer because it is the taxpayer who has dominion over the records and the authority to return the summons," *Couch v. United States, supra,* 409 U.S. 334, n. 18, we fail to understand what purpose was served by issuance of a summons to the Taxpayers' attorney in this case, except to interject into the enforcement proceeding a spurious standing issue that might improve the

[27] *In re Ruppert,* 309 F.2d 97, 98 (6th Cir. 1962); *Bifferato v. States Marine Corp. of Delaware,* 11 F.R.D. 44 (S.D. N.Y. 1951). See also, *Drehle v. Fleming,* 274 N.E. 2d 53 (Ill. Sp. Ct. 1971); *Williams v. Consolidated Investors, Inc.,* 472 P.2d 248 (Kan. Sp. Ct. 1970); *Unger v. Los Angeles Transit Lines,* 4 Cal. Rptr. 370 (Dist. Ct. of App. 1960).

[28] *Schwimmer v. United States,* 232 F.2d 855, 860 (8th Cir. 1956), *cert. den.,* 352 U.S. 833 (1956); *In re Rivera,* 79 F.Supp. 510 (S.D. N.Y. 1948); *Alma-Schuhfabrik AG v. Rosenthal,* 25 F.R.D. 100 (E.D. N.Y. 1960).

[29] See cases cited at footnote 27. Compare *In re National Public Utility Investing Corporation,* 79 F.2d 302 (2d Cir. 1935).

Government's legal position. Since the real parties in interest were the Taxpayers, the summons should have been served upon them rather than upon their attorney. The fact that the Government chose to serve the Taxpayers' attorney should not be allowed to impair the constitutional rights of the Taxpayers.

The sole policy reason cited by the Government for requiring the Taxpayers to assert their right in person is simply untenable. The Government argues, relying on *Hoffman v. United States,* 341 U.S. 479 (1951), that it must have the accused assert his privilege in person so that the court may inquire into the basis of the claim (Pet. Brief at 41). However, *Hoffman* was not a standing case, but dealt instead with the question of whether a substantial danger existed for self-incrimination if the accused answered the questions put to him. Moreover, *Hoffman* involved oral testimony, *not* documentary evidence.

In the instant case, the Fifth Circuit correctly observed that the "incriminating character of the materials sought here has never been put in issue" *United States v. Kasmir, supra,* 499 F.2d at 451, n. 4. The oral testimony of the accused could hardly be expected to shed light on the incriminating character of the papers.[30] But even if that were a genuine

[30] The simple fact is that there was nothing the Taxpayers could have added to the testimony of Mr. Candy (the accountant) or Mr. Kasmir or to the documentary evidence (e.g., the receipt) concerning either the question of ownership or possession. We are at a loss to understand what other testimony the Government seeks that would have been relevant to the disposition of this case. Furthermore, the Government's argument that there is a need to show that the papers are "private papers" is legally irrelevant. In *United States v. White,* 322 U.S. 694, 699

possibility, the Government was free to subpoena the Taxpayers and call them as witnesses in the case. It made no effort to do so, preferring to hide this objection from the court and opposing counsel until after the close of evidence in the case (A. 69).

In *Reisman v. Caplin*, 375 U.S. 440 (1964), this Court held that "third parties *might* intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, *may* intervene" (emphasis added). This Court has never *required* intervention. Thus, the Fifth Circuit was clearly correct when it held:

> While there may be good reason to permit the taxpayer to intervene and to encourage the taxpayer to do so, we see no reason to require that procedure.

499 F.2d at 454.

Finally, if, despite the foregoing, this Court decides to *require* a formal intervention as the exclusive method whereby an accused may raise his constitutional defenses, that requirement should be applied prospectively only and this Court should reach the merits of this case and quash the summons to produce records, *conditioned* upon the Taxpayers' subsequent intervention in the District Court on remand within a stated period of time after judgment. Use of such a condi-

---

Footnote 30 continued:

(1944), this Court stated that "the papers and effects which the privilege protects must be private property of the person claiming the privilege, *or at least in his possession in a purely personal capacity*" (emphasis added). This concept of "possession in a purely personal capacity" was re-emphasized in *Couch v. United States, supra*, 409 U.S. at 330, n. 10. In the proceedings below there was never any issue that Dr. Mason received and held the papers in this case in other than "a purely personal capacity."

tional decree is consistent with the mandate of Rule 1, F.R.C.P., directing federal courts "to secure the just, speedy and inexpensive determination of every action," see *United States Corp. v. Guillory*, 206 F.2d 49, 53 (5th Cir. 1953); *In re Roney*, 139 F.2d 175, 177 (7th Cir. 1944), *cert. den.*, 322 U.S. 753 (1944), and would avoid penalizing the Taxpayers herein for the unsettled state of the law and unnecessarily postponing the determination of the Taxpayers' rights.

CONCLUSION

The Government,through its able attorneys, has raised a veritable thicket of technicalities all designed to show the Court why these Taxpayers should be denied their Fifth Amendment privilege. What is somehow lost in the welter of legal arguments, however, is the fundamental importance of the Privilege itself to a free society and the liberal interpretation it is to be accorded. As this Court stated in the *Hoffman* case:

> The Fifth Amendment declares in part that "No person * * * shall be compelled in any Criminal Case to be a witness against himself." This guarantee against testimonial compulsion, like other provisions of the Bill of Rights, "was added to the original Constitution in the conviction that too high a price may be paid even for the unhampered enforcement of the criminal law and that, in its attainment, other social objects of a free society should not be sacrificed." (cases omitted) This provision of the Amendment must be accorded liberal construction in favor of the right it was intended to secure.

341 U.S. at 485-486

Although almost a century old, we think the following words

from the *Boyd* case are more relevant than ever and provide, after all is said and done, the clearest and most concise answer to Petitioner's many objections:

> . . . illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

116 U.S. at 635.

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT E. GOODFRIEND
CYRIL D. KASMIR
EDWARD A. COPLEY
Attorneys for Respondents

APPENDIX A

ROSENBERG, KASMIR & WILLINGHAM
Attorneys and Counselors at Law
2300 Main Tower
1200 Main Street
DALLAS, TEXAS 75202
214/744-5511

June 18, 1975

The Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: United States of America, et al. v.
C. D. Kasmir and Jerry A. Candy;
Number 74-611

Dear Mr. Rodak:

On this date, I received a copy of the Brief for the Petitioners (Government) in the above entitled and numbered case. The Court granted the Petition for Writ of Certiorari on January 27, 1975. Therefore, under Rule 41 of the Supreme Court Rules, the Government's brief on the merits should have been filed on March 13, 1975. On March 13, 1975, the Court extended the time for the Government to file its brief on the merits to April 12, 1975. On April 10, 1975, the Court further extended the time for the Government to file its brief on the merits to April 19, 1975. On April 18, 1975, the Court further extended the time for the Government to file its brief on the merits to April 30, 1975.

It is my understanding that the Government was advised by

your office that there would be no additional extensions beyond April 30, 1975. In apparent disregard of Rule 41 of the Supreme Court Rules and without even requesting another extension, the Government's brief on the merits was not filed until June 16, 1975, more than three months beyond the original due date and more than six weeks beyond the extended due date.

The purpose of this letter is to inquire as to whether or not you intend to receive and accept the Government's brief on the merits in view of the foregoing.

In the event that you decide to receive and accept the Government's brief, I believe that we should be entitled to the same amount of time to prepare our brief as the Government has had to prepare its brief. Therefore, I respectfully request an extension of time to file our brief on the merits to October 20, 1975, that date being three months beyond the original due date of our brief.

Very truly yours,

Cyril David Kasmir

CDK/1n

CERTIFIED MAIL — NUMBER 809746
RETURN RECEIPT REQUESTED

cc: Honorable Robert H. Bork
Solicitor General of the United States
United States Department of Justice
Washington, D.C. 20530

CERTIFIED MAIL — NUMBER 809747
RETURN RECEIPT REQUESTED